RCMP PUBLIC COMPLAINTS COMMISSION

Royal Canadian Mounted Police Act
Part VII
Subsection 45.46(3)

CHAIRMAN'S FINAL REPORT

FOLLOWING A PUBLIC HEARING

Complainant: Cameron Ward

April 26, 1994

File: 2000-PCC-92235

CHAIRMAN'S FINAL REPORT AFTER A PUBLIC HEARING

I. INTRODUCTION

The Process

Under subsection 45.43(1) of the RCMP Act, the Commission Chairman, where he considers it advisable in the public interest, may institute a public hearing to inquire into a complaint whether or not it has been investigated or reported upon or dealt with by the Force. The Commission Chairman will then assign members of the Commission to conduct that hearing and those members will be considered the Commission for the purposes of the hearing. Section 45.45 of the Act sets out some of the rules governing the hearings such as that any person giving evidence at a hearing may be represented by counsel. When the hearing is completed, the Commission, that is, the members comprising the panel that conducted the hearing, will prepare an interim report setting out their findings and recommendations about the complaint and that report is sent to the Solicitor General of Canada, the RCMP Commissioner and to all parties and their counsel appearing at the hearing.

Upon receipt of the interim report, the RCMP Commissioner is required to review the complaint in light of the report's findings and recommendations. The Commissioner must then notify the Chairman of the Commission of any further action that has been or will be taken with respect to the complaint or his reasons for not acting on any of the findings or recommendations.

After considering the Commissioner's notice, the Chairman of the Commission will prepare a final report setting out such findings and recommendations with respect to the complaint as he sees fit. That report is sent to the Solicitor General of Canada, the RCMP Commissioner and to all parties and their counsel appearing at the hearing.

II. INTERIM REPORT

Interim Report and Commissioner's Notice

In the present case, the Interim Report dated February 4, 1994, setting out findings and recommendations, was sent to the Solicitor General and the Commissioner. The Commissioner gave notice of the action he would be taking in a letter to the Chairman dated March 16, 1994.

The present report is the Chairman's final report with respect to this complaint. It contains, as a background to any final findings and recommendations, the contents of the Interim Report, which includes a summary of the complaint, the Force's investigation of the complaint, the general observations, and the interim findings and recommendations. This Final Report also includes the Commissioner's letter of March 16, 1994.

III. RCMP COMMISSIONER'S NOTICE

As stated under subsection 45.46(2) of the Act, the Commissioner forwarded the following notice to the Commission Chairman, the content thereof reads as follows:

> I acknowledge receipt of the interim report of February 7, 1994 [sic], file references 2000-PCC-92235, 92G-4769, and materials relevant to the complaints of Mr. Cameron Ward.
>
> The conclusions have been examined and the following notice is provided pursuant to the Royal Canadian Mounted Police Act.
>
> I concur with the findings. I would like to take the opportunity to thank Mr. Lyman R. Robinson, Q.C., the member you appointed to conduct the hearing, for his thorough and complete review of the complaints.
>
> Thank you for your advice. I look forward to receiving your final report.

IV. CHAIRMAN'S FINAL CONCLUSIONS AND RECOMMENDATIONS

The one-member Commission Hearing Panel that completed the hearing into this complaint presented a comprehensive Interim Report in this matter. The Panel made findings and recommendations with respect to two complaints. I wish therefore, after having considered the Commissioner's Notice reproduced in Part III herein, to state my final conclusion with respect to these complaints.

Since the Commissioner concurs with the findings of the Hearing Panel, I am satisfied with the Commissioner's notice and need not add anything further.

Chairman

April 26, 1994

Jean-Pierre Beaulne, Q.C.
Chairman
RCMP Public Complaints Commission
P.O. Box 3423, Station "D"
Ottawa, Ontario
K1P 6L4

APPENDIX 1

RCMP PUBLIC COMPLAINTS COMMISSION

Royal Canadian Mounted Police Act
Part VII
Subsection 45.45(14)

COMMISSION INTERIM REPORT

Following a Public Hearing

Into the Complaint

of

Cameron Ward

PANEL

Lyman R. Robinson, Q.C.

February 4, 1994

LETTER OF TRANSMITTAL

January 19, 1994

To: The Honourable Herbert E. Gray
Solicitor-General of Canada

To: Commissioner Norman Inkster
Royal Canadian Mounted Police

The undersigned was appointed by Mr. Jean-Pierre Beaulne, Q.C., Chairman, Royal Canadian Mounted Police Public Complaints Commission, pursuant to the authority invested in him under Part VII of the Royal Canadian Mounted Police Act, to conduct a public hearing to inquire into complaints by Cameron Ward in respect of events that occurred in North Vancouver, British Columbia on January 1[illegible], 1992.

I have the honour of submitting this Report in accordance with subsection 45.45(14) of the Royal Canadian Mounted Police Act.

Lyman R. Robinson, Q.C.

APPEARANCES:

Mr. Pierre-Y Delage	Commission Counsel
Ms. Susanne Frost	Counsel for the "appropriate officer" of the RCMP
Mr. Kenneth W. Ball and Mr. Michael Lucas	Counsel for Corporal Magark
Mr. Clark Roberts	Counsel for the Complainant

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COMMISSION REPORT

1. THE NOTICE OF DECISION TO INSTITUTE A HEARING

By a Notice of Decision to Institute a Hearing, the Chairman of the RCMP Public Complaints Commission assigned Lyman R. Robinson, Q.C. to conduct a hearing with respect to complaints made by Mr. Cameron Ward with respect to RCMP Corporal G.W. Magark. The hearing was instituted pursuant to section 45.43(1) of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R - 10 (hereinafter referred to as the "Act"). Where a member of the Commission has been assigned to conduct a hearing, the member is deemed by section 45.45(1) of the Act to be the Commission.

2. THE COMPLAINTS

The Notice of Decision to Institute a Hearing specified two separate complaints. The first complaint alleged that Corporal Magark used excessive force in the conduct of the performance of his duties in relation to Mr.Shayne Hawkes on or about January 17, 1992. The second complaint alleged that:

> "Corporal Magark failed to respond to 'appropriate remedial action' taken by the Force following the incident of March 19, 1990, in that he again discharged his emerging (sic) Response Team weapon in the incident of January 17, 1992, in violation of Force policy."

After an application by counsel for Corporal Magark at the outset of the hearing, I amended the second complaint to read:

> "Corporal Magark discharged his Emergency Response Team weapon in the incident of January 17, 1992, in violation of Force policy."

The reasons for amending the complaint are set forth later in this report.

3. PRELIMINARY APPLICATIONS AND RULINGS

At the outset of the hearing, a number of applications were made by counsel on behalf of the parties. I gave oral decisions with respect to most of the applications and indicated that I would give written reasons in this report with respect to all of the applications. After the conclusion of the hearing, an application was made by Ms. Frost for the reimbursement of expenses incurred by the complainant, member-witnesses and counsel appearing before the Commission. I give the written reasons with respect to all of these rulings prior to dealing with the subject matter of the complaints.

3.1 Application of the Complainant for Disclosure

The complainant sought a direction that he be afforded disclosure of documents, which pertain to these complaints, that are in the possession or control of Commission counsel. This application appeared to stem from a perception of the complainant that he was in a position that was adversarial to that of Commission counsel. When a hearing has been instituted, the primary responsibility of gathering evidence, determining its relevance, and presenting the evidence to the hearing panel of the Commission rests on Commission counsel. Section 45.45(5) gives the parties and any other person who satisfies the Commission that he/she has a substantial and direct interest in a complaint to present evidence and make representations. There is nothing in the Act that suggests that parties or other persons have any entitlement to disclosure of documents in the possession or control of the Commission or Commission counsel. The Commission is not in an adversarial position in relation to a complainant. The Commission, through its legal counsel, represents the public. The relationship of the Commission to the complainant or other parties is not analogous to the relationship between the Crown and the accused in a criminal proceeding and none of the factors that led the Supreme Court of Canada in R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.) to order disclosure by the Crown to an accused in a criminal proceeding are applicable to a hearing under Part VII of theAct.

In the course of the argument with respect to this application, both Mr. Delage and Ms. Frost made reference to Rule 7 of the Rules of Practice of the Commission, SOR/93/17. The relevant portion of Rule 7 provides:

> "7. (1) A party or interested person may, in writing, request that any other party or interested person produce, forthwith, any of the following:
>
> (a) any pertinent record that is in the person's possession or control;"

The term "party" is defined in section 1 of the Rules of Practice as having the same meaning as in subsection 45.45(15) of the Act. Subsection 45.45(15) of the Act defines "party" in the following manner:

> "(15) In this section and section 45.46, 'parties' means the appropriate officer, the member or other person whose conduct is the subject-matter of a complaint and, in the case of a complaint under subsection 45.35(1), the complainant."

Neither the Commission nor Commission counsel is a "party" to the hearing and I do not interpret the term "interested person" as including the Commission. Therefore, Rule 7 may not be used for the purpose of compelling Commission counsel to afford disclosure of documents that are under the possession or control of Commission counsel.

The Commission receives documents from various sources including documents provided by the Commissioner of the RCMP pursuant to s. 45.41(2) of the Act. It is the function

of Commission counsel to review all of the documents that are obtained by the Commission and to determine those documents that are both relevant to the complaint and admissible as evidence. Some documents may be relevant but not admissible. For example, s. 45.45(8)(a) of the Act provides:

> "(8) Notwithstanding subsection (4), the Commission may not receive or accept
>
> (a) subject to subsection (9), any evidence or other information that would be inadmissible in a court of law by reason of any privilege under the law of evidence;"

Section 45.45 (8) goes on to identify other types of evidence that are inadmissible. It is part of the responsibility of Commission counsel to ensure that documents, which are clearly privileged, are neither tendered as evidence nor disclosed to any of the parties.

The practice adopted by Commission counsel in this and other hearings under Part VII of the Act has been to provide other counsel with copies of all documents that Commission counsel proposes to tender in evidence at the hearing. This is usually done well in advance of the commencement of the hearing. If the other counsel have an objection to the admission of a particular document, Commission counsel may, if persuaded by the objection, decide not to tender the document. If Commission counsel is not persuaded, the objection may be pursued before the hearing panel of the Commission. Consequently, counsel are rarely surprised at a hearing by the tendering of a document by Commission counsel.

For all of the above reasons, the application by the complainant for a direction that the complainant be afforded disclosure of documents pertaining to these complaints which are in the possession or control of Commission counsel is denied.

3.2 Application for Reimbursement of Expenses

After the conclusion of the hearing, an application was made by Ms. Frost, through Mr. Delage, in the following terms:

> "I would be grateful if you would bring to Mr. Robinson's attention the provisions of s. 45.45(13), and ask him to consider reimbursement of expenses incurred by the complainant, member-witnesses and counsel appearing before the Commission."

Section 45.45(13) of the Act grants authority to the Commission to award travel and living expenses in limited circumstances. It provides:

> "(13) Where the Commission sits at a place in Canada that is not the ordinary place of residence of the member or other person whose conduct

> is the subject-matter of the complaint, of the complainant or of the counsel of that member or other person or that complainant, that member or other person, complainant or counsel is entitled, in the discretion of the Commission, to receive such travel and living expenses incurred by the member or other person, complainant or counsel in appearing before the Commission as may be fixed by the Treasury Board."

It will be noted that a prerequisite for the Commission to exercise the authority granted by section 45.45(13) is that the hearing be conducted at a place other than the ordinary residence of the person who is seeking to receive payment of his or her expenses. This hearing was held in Vancouver. There is no evidence before the Commission to suggest that the ordinary place of residence of any of the individuals on whose behalf an application for expenses has been made, is outside Vancouver. For this purpose, I am interpreting Vancouver as including the area generally known as greater Vancouver. Corporal Magark (the member whose conduct is the subject-matter of the complaint) is currently stationed in Vancouver. Mr. Cameron Ward (the complainant), Mr. Kenneth Ball (counsel for Corporal Magark) and Mr. Clark Roberts (counsel for the complainant) each have their places of business in Vancouver. Therefore, the essential prerequisite that would enable the Commission to exercise the statutory authority granted by section 45.45(13) to award payment of travel or living expenses to any of the named persons is absent. Even if the prerequisite had been satisfied, section 45.45(13) limits the Commission to awarding travel and living expenses and it does not extend to other types of expenses such as legal costs.

Section 46(3) of the Act provides:

> "(3) Any person, other than a member, summoned to attend at any proceeding before a board is entitled, in the discretion of the Board, to receive the like fees and allowances for so attending as if summoned to attend before the Federal Court."

Section 46(1) defines "board" as including the "Commission". The word "commission" is defined by section one of the Act as meaning the Royal Canadian Mounted Police Public Complaints Commission. Section 46(3) expressly excludes members of the RCMP from being entitled to receive the fees and allowances provided by section 46(3). Therefore, the claim by Ms. Frost on behalf of the member witnesses must be dismissed. The complainant was not summoned as a witness and therefore the claim by Ms. Frost on behalf of the complainant must be dismissed.

In her application, Ms. Frost also referred to the decision of the Commission in the hearing into the complaints of Ms. Nowdluk-Reynolds where the Commission did make an award of costs. My understanding of the reasons why costs were awarded in that case is that the hearing was held in Iqaluit, Northwest Territories, and that Iqaluit was not the ordinary place of residence of either the members whose conduct was the subject matter of the complaints or the member-witnesses. In this case, based on the information before

me, all of the member-witnesses and Corporal Magark are stationed in the greater Vancouver area.

Therefore, all applications for payment of expenses, fees and allowances are dismissed.

3.3 Application by the Complainant for Legal Costs

The complainant sought a direction that he be compensated for the legal fees that he had incurred or may incur pertaining to the hearing of these complaints. Counsel for the complainant argued that the complainant required independent counsel because the complainant and Commission counsel seemed to be in an adversarial position. In support of this argument, he cited the following matters:

(1) Commission counsel had not consulted the complainant with respect to any viva voce evidence that the complainant might wish to give;

(2) the complainant was not included on the list of witnesses that Commission counsel intended to call at the hearing;

(3) the refusal by Commission counsel, in response to earlier written request of the complainant, to disclose documents or records in the possession or control of Commission counsel; and

(4) the refusal of Commission counsel to afford the complainant the opportunity to attend witness interviews conducted by Commission counsel.

At the outset of his opening statement at the hearing, Mr. Roberts stated that the complainant was not personally involved in the incidents that are the subject matter of the hearing. The complainant's knowledge and information with respect to the events that are the subject matter of these complaints were apparently initially obtained from reading newspaper articles that were published in the Vancouver Sun. He subsequently received additional information by means of correspondence with officers of the RCMP. When a complainant has been directly involved in the subject matter of a complaint, Commission counsel would normally have consulted the complainant with respect to viva voce evidence that the complainant may be able to give. In this case it is not apparent that the complainant could give any admissible testimony and Mr. Roberts did not suggest that the complainant could give any admissible testimony to the Commission.

I have already found that there is no obligation on Commission counsel to provide the complainant with disclosure of records that are in the possession or control of Commission counsel. The purpose of Commission counsel conducting interviews with potential witnesses is to ascertain whether witnesses have any relevant and admissible evidence to give. There is no precedent for suggesting that a party or a complainant should be afforded an opportunity to be present during such interviews.

I do not draw an inference from any of the matters enumerated above that Commission counsel was or could reasonably be seen to be in an adversarial position to that of the complainant. Indeed, from my observations, Mr. Delage performed his role as Commission counsel in an even- handed and thoroughly proper manner.

Where a complainant will be giving testimony or providing other evidence, and particularly where there may be other legal proceedings arising from the subject matter of the complaint, which involve the complainant as a witness or as a party, the complainant may benefit from the assistance of legal counsel. In prior hearings where these circumstances have arisen, and the complainant could not afford counsel, arrangements have been made to compensate the counsel retained by the complainant. Those circumstances do not exist with respect to this hearing.

Finally, I observed that Mr. Roberts did not attend or participate in the hearing after the adjournment that followed his presentation of the complainant's opening statement. I am not suggesting any criticism of Mr. Roberts. There simply did not appear to be any need for the complainant to have legal counsel prior to the hearing or during the course of the hearing.

Even if the Commission has a statutory authority or discretion to award payment of a complainant's legal costs, this application of the complainant is denied for the reasons expressed above.

3.4 Objections to the Content of the Second Complaint

At the outset of the hearing, Mr. Ball, counsel for Corporal Magark raised several objections to the portion of the second complaint that alleged that Corporal Magark had "failed to respond to 'appropriate remedial action'." In making these objections, Mr. Ball was supported by Ms. Frost.

First, it was argued that whether or not Corporal Magark had been subject to "appropriate remedial action" and whether or not Corporal Magark had failed to respond to any "appropriate remedial action" were matters of internal RCMP discipline and as such it did not fall within the jurisdiction of the RCMP Public Complaints Commission but rather they were matters that fell within the mandate of the External Review Committee that is established by the Act. Mr. Ball's position was that Corporal Magark had never breached the Discipline Code of the RCMP and there had never been any finding that Corporal Magark had breached the Discipline Code. Furthermore, both Mr. Ball and Ms. Frost argued that matters of internal RCMP discipline are "personal information" with respect to "employment history" and that the Privacy Act, R.S.C. 1985, c. P-21, s. 8 prohibits the disclosure of such information without the consent of Corporal Magark and that he had not consented to the disclosure. Section 8 of the Privacy Act provides:

> "8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section."

The term "personal information" is defined by section 3 of the Privacy Act in a manner that includes employment history. It provides, in part:

> " 'personal information' means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
>
> . . .
>
> (b) information relating to the ... employment history of the individual ..."

Both the RCMP and the RCMP Public Complaints Commission are "government institutions" specified in the Schedule to the Privacy Act.

Section 69(2) of the Act provides that the prohibitions contained in sections 7 and 8 of the Act do not apply to information that is "publically available". However, Mr. Ball argued that any prior disclosures of this information by means of publication in the Vancouver Sun and in a letter from Inspector Vye addressed to the complainant dated March 4, 1992, were contrary to the Privacy Act, and that such disclosures did not render the information "publically available". Finally, they argued that to admit this information as evidence at an RCMP Public Complaints Commission hearing would have the effect of exacerbating the prior disclosures, which were contrary to the Privacy Act, and the admission would require Corporal Magark to disclose further "personal information", which he would not otherwise be required to disclose, in order to defend himself against the second complaint.

In support of the framing of the second complaint, Commission counsel argued that the complaint concerned "conduct" by Corporal Magark in the performance of his duties and functions as those terms are used in section 45.43 and other sections of the Royal Canadian Mounted Police Act and therefore the complaint, as drafted, was a proper matter for inquiry by the Public Complaints Commission. He also argued that the prohibition against disclosure found in section 8(1) of the Privacy Act is subject to the exceptions contained in section 8(2) of the Act. Section 8(2)(c) of the Act provides:

> "(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> . . .
>
> (c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information . . ."

Mr. Delage argued that "personal information" pertaining to "appropriate remedial action" that may relate to Corporal Magark could be obtained by the Commission by

means of a summons issued pursuant to the Act and that disclosure by this means was not contrary to the Privacy Act.

Ms. Frost acknowledged that the conduct of Corporal Magark in the performance of his duties was subject to review by the Public Complaints Commission but she argued that how well he does his work, in the opinion of the RCMP management, is "personal information" that is protected from disclosure by virtue of the Privacy Act.

The incident of March 19, 1990, which is referred to in the second complaint, is also known as the Glover incident where Mr. Glover was apparently shot by Corporal Magark during the course of conducting a search for drugs pursuant to a search warrant. The Glover incident itself has previously been reviewed by the Chairman of the RCMP Public Complaints Commission and on June 4, 1993, the Chairman reported that he was satisfied with the Force's disposition of the complaint concerning the Glover incident. Therefore, the Glover incident itself was not included in the Notice of Decision to institute this hearing.

I concluded that whether or not any remedial action had been prescribed by the Force in relation to Corporal Magark and whether or to what extent Corporal Magark had responded to any such remedial prescription were matters of internal management and discipline. Any inquiry into those matters falls within the internal procedures of the RCMP described in Parts IV and V of the Royal Canadian Mounted Police Act and the mandate of the External Review Committee established pursuant to Part II of the Act. Therefore, I amended the second complaint by striking out the words:

> "failed to respond to 'appropriate remedial action' taken by the Force following the incident of March 19, 1990, in that he again".

The second complaint as amended then read:

> "Corporal Magark discharged his Emergency Response Team weapon in the incident of January 17, 1992, in violation of Force policy."

The effect of amending the second complaint in this manner had the effect of rendering irrelevant most of the evidence that may have been subject to objection by Mr. Ball and Ms. Frost on the basis that disclosure of the evidence would contravene the Privacy Act. In any event, no further objection to the admissibility of evidence was made during the hearing on the basis of the Privacy Act. On the basis of the second complaint, as amended, I expressed the opinion in the oral reasons given which I gave at the conclusion of this application that evidence with respect to whether or not Corporal Magark had been given information, advice or orders with respect to the circumstances where it was appropriate to use his Emergency Response Team weapon would be relevant and admissible with respect to the issue of whether Corporal Magark was aware of the existence of RCMP policies governing the use of Emergency Response Team weapons. Evidence of this nature was tendered and admitted without objection. If an objection had

been made to the admissibility of such evidence on the basis of the Privacy Act, I would have ruled that section 8(2)(c) of the Privacy Act applied and the evidence be disclosed if a proper summons had been issued.

This ruling should not be interpreted as precluding the admissibility in other circumstances of evidence that a member has previously been found to have breached the Discipline Code.

3.5 Specification of the Public Interest

The Notice of Decision to Institute a Hearing, which was signed by the Chairman of the RCMP Public Complaints Commission, provides that the hearing was instituted pursuant to section 45.43(1) of the Act. Section 45.43(1) provides that when the Commission Chairman considers it "advisable in the public interest", he may institute a hearing to inquire into a complaint concerning the conduct of a member in the performance of any duty or function under the Act. Ms. Frost raised an objection to the form of the Notice of Decision to Institute a Hearing and argued that when a hearing is instituted in the public interest, the Notice should specify the particular public interest that is to be the subject of inquiry at the hearing. The Notice instituting this hearing did not specify any particular public interest.

Section 45.43(1) of the Act clearly assigns to the Chairman of the RCMP Public Complaints Commission the function of determining whether it is advisable in the "public interest" to institute a public hearing to inquire into a complaint. The Act does not require the Chairman to stipulate in the Notice of Decision to Institute a Hearing the particular aspects of the public interest that motivated the Chairman to institute a public hearing. It is not the function of the hearing panel, which has been assigned to conduct the hearing, to review the decision of the Chairman of the Commission with respect to whether or not a sufficient public interest had been identified and whether or not a hearing should have been instituted.

Counsel for the appropriate officer invited me to declare those aspects of the public interest that I would use as a reference point to determine the relevance of evidence tendered with respect to the public interest aspect of these complaints.

The term "public interest" is not defined in the Act and it has not been defined by the courts in relation to the Royal Canadian Mounted Police Act. Interpretations of the term "public interest" in other statutes may be helpful, however, those interpretations are not binding and they may have limited application because of the subject matter context in which the term is used. Ms. Frost cited two cases where the term "public interest" had been interpreted in the context of other statutes. In Re A.C.S. (1969), 7 C.R.N.S. 42 (Que. S.C.), the court was considering the term in relation to appeals under the former Juvenile Delinquents Act, R.S.C. 1952, c. 160. Mackay J. quoted the following passage from the judgment of Lord Chief Justice Campbell in Regina v. Bedfordshire (Inhabitants) (1855), 119 E.R. 196:

> "... the term 'interest' as used in the words public or general interest does not mean that which is interesting from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected."

In the context of Re A.C.S., Mackay J. found that there was a "public interest" in the student "sit-in" at Sir George Williams University. That "public interest" related to the public's interest in knowing about the philosophy that was being inculcated into the youths that were attending the University and the public's interest in how public funds, which were raised through general taxation, were being spent by the University. With respect to the complaints, which are the subject matter of this hearing, the "public interest" relates to the public interest in knowing about the policies of the RCMP in relation to the drawing and using of firearms and the use of semi-automatic weapons by general duty police members who are supported by the use of public funds raised through general taxation.

Ms. Frost also cited Re Lindsay and Motor Transport Board of Manitoba et al ((1989), 62 D.L.R. (4th) 615 (Man. C.A.) in relation to the determination of the public interest. In that case Philp. J.A., with whom Twaddle J.A. concurred, stated at page 628:

> "While the determination of the public interest is a matter within the discretion of the Board, that determination must find justification in the facts."

In the report of the RCMP Public Complaints Commission into the complaint of Kitty Nowdluk-Reynolds, the public interest aspect of the Commission's responsibilities was expressed in the following manner, at page 44:

> "However, the scope of this inquiry must, when the public interest requires, extend beyond the conduct of RCMP members and embrace issues which underlie, relate to, or are collateral to such conduct."

After considering the subject matter of the complaints, I identified two aspects of the public interest that arose from the subject matter of the complaints: (a) whether RCMP policies pertaining to the drawing and use of firearms were satisfactory; and (b) whether there were any reasons to limit the use of semi-automatic weapons by members of the RCMP engaged in general police duties.

3.6 Has the Public Interest Already Been Satisfied?

Mr. Ball argued that any public interest in relation to the events that are the subject of these complaints had already been satisfied or will be satisfied by other reviews and studies that have already been completed or will be completed within the next six months. This argument had several dimensions. First, Mr. Ball argued that the public interest in the actual shooting of Shayne Hawkes had already been satisfied by the review of Corporal Magark's conduct by Regional Crown counsel in British Columbia. After conducting that review, Crown counsel decided not to approve any criminal charges against Corporal Magark. The answer to that argument is that Regional Crown counsel has an entirely different function to perform than the Public Complaints Commission. A review by Crown counsel is to determine whether there is sufficient evidence of criminal wrongdoing that will likely result in a conviction under the Criminal Code or some provincial statute. In making this determination, Crown counsel must consider rules of evidence and burdens of proof that are different in criminal proceedings compared to an inquiry conducted by the RCMP Public Complaints Commission. Furthermore, the determination by Crown counsel is not a review that is conducted in a public forum where evidence is presented in public and written reasons are given for the decision on whether or not charges will be laid.

Second, Mr. Ball argued that the trial of Shayne Hawkes on the charges of breaking and entering the Sutherland Bible Chapel will satisfy any public interest in relation to the subject matter of these complaints. The short answer to this argument is that Mr. Hawkes is a fugitive at large and there is no assurance that Mr. Hawkes will ever be brought to trial on these charges notwithstanding that there is a bench warrant for his arrest. Furthermore, even if Mr. Hawkes is brought to trial, it is unlikely that those aspects of the public interest, which I identified earlier, will be addressed during the trial of Mr. Hawkes.

Third, Mr. Ball and Ms. Frost argued that the public interest in the use of semi-automatic weapons by police officers either had already been adequately addressed by reports or studies in other police jurisdictions including the Province of Ontario and the City of Vancouver or will be addressed in British Columbia by the forthcoming report of the Commission of Inquiry into Policing being conducted by Mr. Justice Oppal of the British Columbia Supreme Court.

With respect to the reports prepared with respect to the use of semi-automatic weapons by the members of the Ontario Provincial Police and the Vancouver City Police, both of these reports focus on a comparative analysis of the technical features and characteristics of the semi-automatic pistols compared to .38 calibre revolvers and the preferences of law enforcement personnel for one weapon or the other. The comparative analysis includes ammunition capacity, reloading functions, handling characteristics and other matters that are of primary concern to the police officer. The authors of these reports have not examined the subject from the perspective of the public interest. If there are any concerns from a public interest perspective, these may be brought to the attention of the

Commissioner of the RCMP and the Solicitor General of Canada by way of findings and recommendations contained in a report of the RCMP Public Complaints Commission.

With respect to the inquiry into policing being conducted by Mr. Justice Oppal, Mr. Ball advised the hearing that he had forwarded the minutes of the pre-hearing teleconference in relation to this matter to Mr. Richard Peck, Q.C., counsel to the Oppal Commission of Inquiry. Mr. Justice Oppal advised the Commission, through Mr. Ball, that he would be making recommendations in his report with respect to the use of semi-automatic handguns by police officers. Mr. Justice Oppal's report will follow an in-depth analysis of many aspects of policing in British Columbia that has extended well over a year. Mr. Justice Oppal's inquiry is directed toward policing in British Columbia including the RCMP's role in contract policing for the Province of British Columbia and several large municipalities. When his report is made, it will undoubtedly merit careful consideration by the RCMP with respect to its operations within British Columbia and its influence may extend beyond British Columbia.

3.7 Application of Corporal Magark and the Appropriate Officer for an Adjournment

Mr. Ball made an application to adjourn the hearing into the complaint with respect to the alleged use of excessive force by Corporal Magark in relation to the shooting of Mr. Shayne Hawkes. Mr. Ball sought an adjournment until the trial of Mr. Hawkes has been completed on the charges of breaking and entering the Sutherland Bible Chapel. Commission counsel opposed the granting of an adjournment. In support of this application, Mr. Ball made three arguments.

3.7.1 Criminal Trials should be Completed First

Mr. Ball argued that when both criminal proceedings and civil or administrative proceedings have been initiated with respect to the same subject matter, the criminal proceedings should be permitted to reach their final conclusion before proceeding with an administrative or civil proceeding. That was the position at common law. However, the common law position was abrogated by section 11 of the Criminal Code which provides:

> "11. No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence."

Zuber J. pointed out in Stickney v. Trusz (1973), 25 C.R.N.S. 257 (Ont H.C.), affirmed 28 C.R.N.S. 126 at 127 (Ont. C.A.) that the common law rule only existed to ensure adequate prosecution by forcing a plaintiff to first bring a criminal charge. Today, the Crown has assumed the burden of criminal prosecutions and the reason for the common law rule has disappeared. In Haywood Securities Inc. v. Inter-tech Resource Group Inc. et al (1985), 68 B.C.L.R. 145 (B.C.C.A.), MacFarlane J.A., after referring to section 11 of the Criminal Code and after citing a number of cases, stated at page 155:

> "The effect of those cases is that there is no absolute right to have civil proceedings stayed in the face of criminal proceedings, but there is a protection, available on a discretionary basis ... the discretion will be exercised on the basis that a fair trial of the accused and a just determination of criminal charges cannot be made unless proceedings are stayed."

That statement of MacFarlane J.A. was made in the context of an application for an order to compel a party in a civil proceeding, who was the subject of a criminal investigation. to attend and answer questions on an examination for discovery but the principle is equally applicable to a hearing of the RCMP Public Complaints Commission. In Stickney v. Trusz (1973), 25 C.R.N.S. 257 (Ont H.C.), affirmed 28 C.R.N.S. 126 at 127 (Ont. C.A.), the court refused to grant a stay with respect to concurrent civil proceedings because the defendant failed to demonstrate any specific prejudice by virtue of being required to testify at an examination for discovery in the civil action notwithstanding that there were outstanding charges of criminal fraud against the defendant in relation to the same matter.

I was informed by counsel that even if Mr. Hawkes, who was a fugitive at large at the time of this hearing, was apprehended immediately, it was unlikely that his trial on the breaking and entering charges would be scheduled until the spring of 1994.

A reason that is sometimes advanced for adjourning a civil proceeding until after a criminal trial has been completed is that the defendant may be compelled to testify in the civil proceeding and in the course of so doing, he may incriminate himself. Mr. Hawkes has not appeared at this hearing despite the fact that he is apparently aware that the hearing is proceeding. Therefore, there is no danger that Mr. Hawkes will incriminate himself. However, even if Mr. Hawkes had appeared and was available to testify, section 13 of the Charter of Rights and Freedoms would have given him the right not to have any incriminating evidence so given used against him in any other proceedings except in a prosecution for perjury or for the giving of contradictory evidence. He could also have claimed the protection of section 5 of the Canada Evidence Act.

I had also been informed during the pre- hearing teleconference through Mr. Redding that Vancouver Regional Crown Counsel, Mr. Robert Wright had no objection to the RCMP Public Complaints Commission hearing proceeding on November 8, 1993 on all aspects of the complaint subject only to a request that there be order for the exclusion of those witnesses who had testified at the preliminary inquiry prior to their testifying.

I did not hear anything to indicate that "a just determination of the criminal charges", to adopt the language of MacFarlane J. in Haywood Securities Inc. v. Inter-tech Resource Group Inc. et al. (1985), 68 B.C.L.R. 145 (B.C.C.A.), against Mr. Hawkes could not be made unless the RCMP Public Complaints Commission hearing was stayed until the completion of the trial of the criminal charges against Mr. Hawkes relating to events of January 16-17, 1992. Therefore, I refused to grant an adjournment.

I wish to add that if there had been criminal charges against the member of the RCMP who was the subject of a complaint with respect to which a hearing had been instituted, different considerations may apply: See Leach v. Royal Canadian Mounter Police Public Complaints Commission, [1991] 3 F.C. 560 at 580- 81 (T.D.)

3.7.2 No Publication Order Made at Preliminary Inquiry

Mr. Hawkes was committed to trial following a preliminary inquiry in May, 1992. At the commencement of the preliminary hearing, the presiding judge, at the request of defence counsel, made the usual order pursuant to section 539 of the Criminal Code, directing that the evidence taken at the inquiry not be published in any newspaper or broadcast before such time as the accused, Mr. Hawkes, is discharged or if Mr. Hawkes was committed to trial, the trial has ended. Mr. Hawkes was committed for trial but the trial has not yet been held.

Mr. Ball argued that if Corporal Magark testified before this hearing with respect to matters on which he gave testimony at Mr. Hawkes preliminary inquiry, he may "potentially" be in breach of the "no publication order" that was made under section 539 of the Criminal Code. Mr. Ball cited R. v. Banville (1983), 34 C.R. (3d) 20 (N.B.Q.B.) in support of his argument. Ms. Frost joined Mr. Ball in this argument on behalf of four RCMP members who gave evidence at the preliminary inquiry of Mr. Hawkes and who have been summoned to give evidence at this hearing.

Section 539 of the Criminal Code is clearly directed at newspapers and the broadcast media. When an order is made, it prohibits them from publishing or broadcasting evidence that has been given at a preliminary inquiry until the accused is discharged at the conclusion of the preliminary inquiry or, if the accused is committed for trial, until the trial has ended. Testifying at an RCMP Public Complaints Commission hearing could not be construed as publication in a "newspaper". The prohibition against "broadcasting" of evidence given at a preliminary inquiry after a section 539 order is clearly intended to place the electronic media under the same restrictions as the print media and has no application to the testimony of witnesses who testify at an RCMP Public Complaints Commission hearing. The section has never been applied to a witness who is required to testify by a summons or subpoena in another proceeding.

The case of R. v. Banville (1983), 34 C.R. (3d) 20 (N.B.Q.B.), which was cited by Mr. Ball, does not, in my opinion, have any application to the issue under consideration. Mr. Banville was a reporter for an American newspaper which was published in the State of Maine that had a very limited circulation in the Province of New Brunswick. Mr. Banville attended a preliminary inquiry where a no publication order had been made. Notwithstanding the order, Mr. Banville, with full knowledge of the no publication order, submitted an article to the newspaper which published evidence that was subject to the no publication order. Mr. Banville was prosecuted for contravening the no publication order contrary to what is now section 539 of the Criminal Code and was convicted pursuant to section 21 of the Criminal Code as a party to the offence. His conviction was upheld on

appeal. I do not think that R. v. Banville has any application to a witness who is required to testify by a summons or subpoena in another proceeding.

Therefore, I rejected this argument as a ground for adjourning the hearing into the first complaint.

At the commencement of the hearing of evidence and periodically throughout the hearing, I advised the media who were present of the existence of the section 539 order and advised them to seek their own legal counsel in relation to whether the publication of evidence tendered at the RCMP Public Complaints Commission hearing, where the evidence had also been evidence tendered at the preliminary inquiry, constituted a violation of the section 539 order.

3.7.3 Danger of Conferring an Advantage on Mr. Hawkes

Mr. Ball suggested that if evidence taken at the RCMP Public Complaints Commission hearing was published in the newspaper or broadcast media, counsel for Mr. Hawkes at his eventual trial on the breaking and entering charges could argue that Mr. Hawkes' opportunity to obtain a fair and impartial jury had been compromised because the minds of potential jurors may have been tainted by newspaper accounts or by reports on radio or television with respect to evidence given at the RCMP Public Complaints Commission hearing. This argument assumed that the newspapers and broadcast media would not respect the above-mentioned no publication order. Even if evidence is published, I am confident that, somewhere in British Columbia, a jury can be found that has not been influenced by evidence given at this hearing.

3.8 Exclusion of Witnesses Order

Out of respect for the request of Vancouver Regional Crown counsel, an order was made with respect to those witnesses who gave evidence at the preliminary inquiry into the charges against Shayne Hawkes, that they be excluded from the hearing room prior to giving their testimony.

3.9 Role of Alternate Members

The final preliminary issue raised by Ms. Frost pertained to whether the Chairman of the RCMP Public Complaints Commission should have assigned Mr. L. Allan Williams, Q.C., to conduct this hearing rather than myself, having been appointed as the alternate member of the Commission for British Columbia. I am not the proper person to rule on such an issue. For the record, I observe that section 45.29(8) of the Act provides that an alternate member may be appointed in the event of the absence, incapacity or ineligibility of a member of the Commission. I understand that the appointment of Mr. L. Allan Williams, Q.C., as the part-time member for British Columbia expired in September 1993.

4. ADMISSIBILITY OF STATEMENT OF SHAYNE HAWKES

Early in the hearing, an issue arose concerning the admissibility of a statement given by Mr. Shayne Hawkes to an RCMP investigator several weeks after the date on which Mr. Hawkes was shot by Corporal Magark. At the hearing, I ruled that the statement was inadmissible and I gave brief oral reasons for the ruling. I stated that I would give written reasons for the ruling in this report.

The Commission sought to have Mr. Hawkes attend the hearing for the purpose of testifying with respect to the events of January 17, 1992. A summons was issued to require Mr. Hawkes' attendance but the Commission was unable to serve the summons on Mr. Hawkes. Reference was made earlier in this report to the fact that Mr. Hawkes had not appeared for his criminal trial in September 1993 and a bench warrant had been issued for his arrest. Notwithstanding the inability of Commission counsel to serve a summons on Mr. Hawkes, Mr. Redding, the Regional Director of the Commission for British Columbia and the Yukon, had communicated with Mr. Hawkes by telephone. Mr. Redding advised Mr. Hawkes of the date when this hearing was scheduled to commence. Mr. Hawkes apparently gave Mr. Redding some indication that he might appear at the hearing but he did not appear. Faced with the non-appearance of Mr. Hawkes, Mr. Delage sought to tender in evidence a written statement that Mr. Hawkes had given to an RCMP investigator several weeks after Mr. Hawkes had been shot. Mr. Ball and Ms. Frost objected to the admission of the statement on the ground that the statement was hearsay.

An excellent definition of hearsay was provided by MacDonald J.A. in R. v. Baltzer (1974), 27 C.C.C. (2d) 118 at 143 (N.S.C.A.) where he said:

> "If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is the evidence -- the truth or falsity of the statement is of no consequence: if the relevance of the statement lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is."

Mr. Delage acknowledged that the written statement of Mr. Hawkes was hearsay but he argued that the statement should nevertheless be admissible on one of three bases, namely:

(a) the more flexible approach to the admissibility of hearsay evidence articulated by the Supreme Court of Canada in a series of recent decisions;

(b) administrative tribunals are not bound by the strict rules of evidence applicable in criminal or civil courts and that administrative tribunals may accept hearsay evidence; or

(c) the sections of the Royal Canadian Mounted Police Act that pertain to the admissibility of evidence.

Each of these bases will be considered.

4.1 The Principled Approach to the Admissibility of Hearsay

The effect of the series of recent decisions by the Supreme Court of Canada is that hearsay evidence is admissible if the evidence is necessary and reliable and the probative value of the evidence is not outweighed by its prejudicial effect. The rationale for this new approach to the admissibility of hearsay evidence was articulated by Lamer C.J.C. in R. v. Smith (1992), 75 C.C.C. (3d) 257 at 270, where he stated:

> "The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination."

And further on page 270 (C.C.C.), Lamer C.J.C. stated:

> "Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity."

Later in his judgment, at page 273-74, Lamer C.J.C. qualified the principles of necessity and reliability by the following statement:

> "In my opinion hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in Khan and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused."

The meaning of these criteria provide further illumination.

(a) Necessity

The meaning of "necessary" was discussed by Lamer C.J.C. in R. v. Smith (1992), 75 C.C.C. (3d) 257 (S.C.C.). At page 271, he quoted paragraph 1421 (2) of Wigmore with approval. Wigmore articulated the following proposition:

> "(2) The assertion may be such that we cannot expect, again or at this time to get evidence of the same value from the same or other sources . . ."

This sentiment was also expressed by Wood J.A., writing the judgment for the Court, in R. v. Chahley (1992), 72 C.C.C. (3d) 193 at 211 (B.C.C.A.), where he stated:

> "There may be cases where, notwithstanding the death of the declarant, other proof is readily available so as to obviate the need to admit the hearsay evidence."

The criterion of necessity may be established when the declarant is dead, insane, or out of the jurisdiction. In R. v. Smith (1992), 75 C.C.C. (3d) 257 at 271 Lamer C.J.C. again quoted with approval from paragraph 1421 of Wigmore:

> "(1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]."

The courts appear to be giving a broad scope to the criterion of necessity. In Mastrangelo v. Kitney (unreported, Ont. Court of Justice, Gen. Div., Dec. 3/92), hearsay evidence with respect to the content of medical records made by a chiropractor, who was now retired from practice and who was out of the jurisdiction, were admitted on the basis of necessity. In R. v. Caplette [1993] B.C.J. No. 727 (unreported B.C. Prov. Ct., Mar. 11/93) (Burnaby Reg. No. 45840), the accused was charged with the operation of a motor vehicle while prohibited. A copy of an order prohibiting the accused from driving, certified to be a true copy by a justice of the peace, was admitted under the new approach to hearsay evidence laid down in R. v. Smith. The copy was not admissible under section 23 of the Canada Evidence Act because it was not certified by a judge of the court that issued the original order. The court found that the criterion of necessity was satisfied because of the practical impossibility of having the original order extracted from the file and the difficulty in getting a judge to certify a copy of the order. Rochio v. Willets, [1993] A.J. No. 360 (unreported Alta. Q.B., Mar. 2/93) was an action for damages arising from injuries suffered in a motor vehicle crash. The plaintiff's claim included cost of retraining as a speech therapist. A hearsay objection was made to the admissibility of letters from several universities setting out the tuition costs of a speech therapy program. The letters were admitted. The court stated:

> "Mere economic expediency here meets the necessity test."

The facts of these cases are not similar to the facts pertaining to the issue of the admissibility of the statement of Shayne Hawkes. Nevertheless, they illustrate that the courts have been giving a broad scope to the criterion of necessity. It must also be remembered that in R. v. Smith, Lamer C.J.C. stated at page 271 stated:

> "Clearly the categories of necessity are not closed."

"Necessary" does not mean "necessary" for the Commission's case. In the context of a criminal case, Lamer C.J.C., in R. v. Smith (1992), 75 C.C.C. (3d) 257 at 271 (S.C.C.), expressed this limitation in the following manner:

> "The criterion of necessity, however, does not have the sense of 'necessary to the prosecution' case."

Mr. Delage argued that a reasonable attempt had been made to secure the attendance of Mr. Hawkes at the hearing and that Shayne Hawkes was "otherwise unavailable" to adopt the words of Wigmore approved by Lamer C.J.C. in R. v. Smith. Mr. Delage adopted the language of McLachlin J., who delivered the judgment of the Court in R. v. Khan (1990), 59 C.C.C. (3d) 92 at 104 (S.C.C.) where she said:

> "The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as 'reasonably necessary'."

Mr. Delage argued that it was "reasonably necessary" to admit the statement of Shayne Hawkes.

Mr. Ball argued that unavailability does not satisfy the criterion of necessity and cited R. v. Aguilar (1992), 77 C.C.C. (3d) 462 (Ont. C.A.) as authority for that proposition. However, in Aguilar no evidence or explanation was adduced by the prosecution to explain the complainant's failure to testify. Here, Mr. Delage has provided an explanation for Mr. Hawkes' failure to testify. Ms. Frost argued that necessity had not been established because Mr. Hawkes had chosen not to be available probably to avoid arrest on the bench warrant that had been issued with respect to charges for which he had been committed for trial. Ms. Frost contended that fleeing a bench warrant for his arrest cannot be a justification for the necessity of admitting a hearsay statement of such a person.

If the statement of Shayne Hawkes is excluded, can the Commission, to use the words of Wigmore in paragraph 1421 "... expect, again or at this time to get evidence of the same value from the same or other sources ...". Only two persons could observe the events that transpired in the toilet cubicle, namely Shayne Hawkes and Corporal Magark, the member against whom the complaint has been made. Those two persons were and are adverse in interest and it would not be surprising if their respective perceptions of the events might differ. Constable Marks was in the men's washroom at the time when the shot was fired, however he could not see inside the toilet cubicle and in particular he could neither see the position of Shayne Hawkes on the toilet nor the wilful movements of Shayne Hawkes. After reviewing the authorities with respect to "necessity" and restricting the present consideration only to the criterion of "necessity", I concluded that the criterion of necessity was established. If Constable Marks or another person had observed the events that transpired within the toilet cubicle, I may not have been persuaded that the criterion of necessity had been established. Notwithstanding that the

criterion of necessity is established, it is still necessary to consider whether the other criteria of admissibility.

(b) Reliability

In R. v. Smith (1992), 75 C.C.C. (3d) 257 at 268 (S.C.C.), Lamer C.J.C. quoted paragraph 1422 of Wigmore with respect to the general criteria for determining the reliability of a hearsay statement. Wigmore's criteria were:

> "a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed.
>
> b Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force.
>
> c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected."

The statement of Shayne Hawkes does not fit within any of Wigmore's three criteria. With respect to the first criterion, several weeks had passed since the shooting and Shayne Hawkes had plenty of opportunity to formulate a statement that he may have believed would assist him in the defence of the criminal charges that had been laid against him with respect to the breaking and entering of the Sutherland Bible Chapel on the night of the shooting.

Wigmore's second criterion is not applicable to the Shayne Hawkes statement because immediately prior to making the statement, he was told by the officer who took the statement:

> "I would like to make it clear that anything you say to me today cannot and would not be used against you in any proceedings that may be before the courts right now. That is the break and enter charge that I understand has been laid against you and you had an appearance in court. I am interviewing you today as a witness in a shooting, and therefore, any statements you make could not be used against you *in any proceedings*. Is that clear to you?" [Emphasis added by italics.]

The last portion of the advice that has been emphasized by italics would convey to Shayne Hawkes that he could not be charged with perjury or other criminal offence with respect to making a false statement. Therefore, it is unlikely that he had any fear of punishment if he did not make a truthful statement.

Wigmore's third criterion is not applicable because the statement of Shayne Hawkes was not made under conditions of publicity that would probably lead to the detection and correction of any error.

The indicia of reliability for hearsay statements were also discussed in R. v. B (K.G.) (1993), 19 C.R. (4th) 1 (S.C.C.). At page 45, Lamer C.J.C. stated:

> " . . . the trial judge must first satisfy him or herself that the indicia of reliability necessary to admit hearsay evidence of prior statements -- a warning, oath, solemn affirmation, or solemn declaration, and videotape record, or sufficient substitutes -- are present and genuine."

None of these indicia of reliability are present with respect to the statement of Shayne Hawkes.

In R. v. Chahley (1992), 72 C.C.C. (3d) 193 (B.C.C.A.), Wood J.A., delivering the judgment of Court, considered the reliability criterion for the admissibility of hearsay statements. He adopted several of the criteria articulated by Jessel M.R in Sugden v. Lord St. Leonards (1876), 1 P.D. 154 when he was considering the rationale of some of the early exceptions to the traditional hearsay rule. These criteria included the criterion that the declarant must be disinterested in the sense that the declaration was made before dispute or litigation arose so that it would be made without bias on account of the existence of a dispute or litigation in which the declarant might be supposed to favour. The interest of the declarant was also the reason for excluding a hearsay statement in Luscar Ltd. v. Pembina Resources Ltd. (1991), 85 Alta. L.R. (2d) 46, 122 A.R. 813 (Alta. Q.B.). The statement of Shayne Hawkes was made after he had been charged with breaking and entering the Sutherland Bible Chapel on January 16-17, 1992. Therefore, he had an interest in making a statement that would favour his interest.

A statement made by John McIntyre to Constable Burton on February 8, 1992 was tendered in evidence during the voir dire that was declared with respect to the admissibility of the statement of Shayne Hawkes. If any objection had been raised to the admissibility of this statement, I would not have accepted the statement without Mr. McIntyre being called as a witness during the voir dire and at least being available for cross-examination. However, all of the counsel who were present agreed to admit the statement of Mr. McIntyre as Exhibit "K" without the necessity of calling him as a witness. In this statement, Mr. McIntyre states that he is a probation officer who has known Shayne Hawkes for several years on a first name basis. Mr. McIntyre happened to meet Shayne Hawkes on January 31, 1992. Mr. McIntyre had heard about the shooting at the Sutherland Bible Chapel and he asked Shayne Hawkes what had happened. Shayne Hawkes replied:

> "I was right out of it man, I can't remember a thing."

Several written reports of the medical personnel who examined and treated Shayne Hawkes at Lions Gate Hospital, where he was taken immediately after the shooting, were admitted in evidence as Exhibit "E". The report from Dr. Hamilton states:

> "The patient admits to having taken drugs earlier in the day."

Handwritten notes, bearing a mechanical imprint of Dr. L. Warner that were apparently attached to a report of Dr. L. Warner contain the following notation:

> "admits to some cocaine and marijuana use today."

A statement attributed to Constable Seymour was also admitted as evidence in the voir dire. The relevant portion read:

> "Constable Seymour was present at the hospital with Hawkes and overheard Hawkes to say to Doctor Hamilton in answer to a question that he Hawkes had used cocaine that night and had smoked other drugs during that day."

Evidence was also entered as part of the voir dire that a toxicology report undertaken with respect to a sample of blood taken from Shayne Hawkes on January 17, 1992, after the shooting, confirmed the presence of opiate, cocaine and cannabinoids in his system.

In R. v. B.(K.G.) (1993), 19 C.R. (4th) 1 (S.C.C.), Lamer C.J.C. considered the issue of reliability in the context of what is required to satisfy the criterion of reliability on a voir dire with respect to admissibility. At page 44, Lamer C.J.C. addressed the burden of proof on a voir dire. He said:

> "With respect to the burden of proof in the voir dire, ordinarily the trial judge should be satisfied that these indicia of reliability are established on the balance of probabilities, the normal burden resting upon a part seeking to admit evidence."

I am not satisfied on the balance of probabilities that the statement of Shayne Hawkes is reliable. It does not satisfy any of the requirements stated in paragraph 1422 of Wigmore that was quoted with approval by Lamer C.J.C. in R. v. Smith (1992), 75 C.C.C. (3d) 257 at 268 (S.C.C.) and none of the indicia of reliability referred to in R. v. B.(K.G.) (1993), 19 C.R. (4th) 1 (S.C.C.) are present. The most significant evidence of the statement's unreliability is the admission that Shayne Hawkes made to John McIntyre that on the night in question he "... was right out of it man, I can't remember a thing" coupled with the evidence of drug use on that date that is found in the admissions made to the medical personnel who attended him and the toxicology report. If, on January 31, 1992, being the date of his conversation with John McIntyre, Shayne Hawkes could not remember a thing about the events that took place on the night of January 17, 1992, I am not satisfied that a

statement that he made to an RCMP investigator has the requisite indicia of reliability to warrant its admission as evidence.

(c) Probative Value v. Prejudicial Effect

Finally, with respect to the new approach to the admissibility of hearsay evidence, Lamer C.J.C. stated that admissibility is always subject to the residual discretion to exclude evidence when its probative value is slight and where undue prejudice might result if the evidence is admitted. Mr. Ball argued that the effect of admitting the written statement of Shayne Hawkes would be to present the evidence of a key witness in a form where cross-examination could not take place and that this was extremely prejudicial to Corporal Magark. In this context, Mr. Ball cited the case of Re the Ontario Crime Commission, Ex parte Feeley and McDermott 1962) 34 D.L.R. (2d) 451 (Ont. C.A.). In that case, the Ontario Court of Appeal was considering, among other things, the need to provide persons, who were the subject of the inquiry, with the opportunity to cross-examine witnesses. At page 475, Schroeder, J.A., after observing that the Commissioner was not bound to observe the strict rules of evidence or all the niceties of practice and procedure, made the following statement that is equally applicable to this hearing:

> "In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded the opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the Commission of Inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one."

A subsequent appeal to the Supreme Court of Canada was dismissed (1963), 40 C.R. 261. It is not necessary for me to decide whether the potential prejudice of Corporal Magark's counsel being unable to cross-examine Shayne Hawkes creates a prejudice that outweighs the probative value of the statement because I have found that is not admissible because it has not met the test of reliability. Nevertheless, I think that Mr. Ball's argument has a great deal of merit.

4.2 Administrative Tribunals are not Bound by Hearsay Rule

Mr. Delage also argued that the statement of Shayne Hawkes should be admitted because administrative tribunals may admit hearsay evidence because they are not bound by the strict rules of evidence applicable in the criminal and civil courts. Mr. Delage cited Canada v. Mills, [1984] F.C.A.D. 3548.01 as one of the many cases that stand for this proposition. The case involved a proceeding under the Unemployment Insurance Act, 1974. The Chief Umpire under the Act had refused to admit hearsay evidence on the basis that hearsay evidence was not admissible. The Court of Appeal held that the Chief

Umpire was entitled to receive and accept hearsay evidence and referred the case back to the Chief Umpire. However, it is important to observe that in cases such as Canada v. Mills, the courts have only stated that administrative tribunals are entitled to receive and accept hearsay evidence. The courts have not said that administrative tribunals must admit hearsay evidence where a tribunal has evaluated the reliability of the evidence and found it not to be reliable. In R. v. War Pensions Entitlement Appeal Tribunal; ex Parte Bott (1933), 50 C.L.R. 228 at 256 (Aust. H.C.), Evatt J. made the following comment about the application of rules of evidence by administrative tribunals:

> "Even if a statute had exempted a tribunal from any duty to comply with the rules of evidence it did not follow that all the rules of evidence could be ignored as if of no account. They represented after all the attempt made through many generations to evolve a method of inquiry best calculated to prevent error and elicit truth."

In this case, I have found that the statement of Shayne Hawkes is not reliable and I have ruled that the statement is not admissible.

4.3 Evidential Provisions of the RCMP Act

Mr. Delage also argued that the statement of Shayne Hawkes should be admitted because a Commission is authorized to admit hearsay evidence pursuant to s. 45.45(4) and s. 24.1(3)(c) of the Royal Canadian Mounted Police Act. Section 45.45(4) provides:

> "(4) The Commission has, in relation to the complaint before it, the powers conferred on a board of inquiry, in relation to the matter before it, by paragraphs 24.1(3)(a), (b) and (c)."

Section 24.1(3)(c) provides:

> "(3) A board of inquiry has, in relation to the matter before it, power
> . . .
>
> (c) to receive and accept on oath or by affidavit such evidence and other information as the board sees fit, whether or not such evidence and other information is or would be admissible in a court of law;"

There is no doubt that sections 45.45(4) and 24.1(3)(c) confer a power on the Commission operating under Part VII of the Act to admit hearsay evidence but they do not compel the Commission to admit hearsay evidence that the Commission has evaluated and found not to be reliable. In this case, I have found that the statement of Shayne Hawkes is not reliable and I have ruled that the statement is not admissible.

4.4 Application by Commission for an Adjournment

After the ruling that the written statement of Shayne Hawkes was not admissible, Commission counsel applied for an adjournment of the hearing until Mr. Hawkes could attend to give testimony in person. The application for an adjournment was denied. It is apparent that Mr. Hawkes is unlikely to appear at a hearing of the Public Complaints Commission until he has been arrested on the bench warrant that has been issued or he surrenders to the authorities. It would be unfair to Corporal Magark to have a complaint about his conduct hanging over him for an unpredictable length of time.

5. THE EVIDENCE

The complainant, Mr. Cameron Ward, was not present when the events that are the subject matter of these complaints occurred on January 16-17, 1992. Mr. Roberts, who appeared on behalf of Mr. Ward at the commencement of the hearing to make an opening statement, stated that the complaints were filed by Mr. Ward as a concerned citizen after Mr. Ward had read several newspaper accounts with respect to the shooting and apprehension of Shayne Hawkes by Corporal Magark. Mr. Roberts also stated that Mr. Ward was unable to attend the hearing due to prior commitments. Consequently, my description of the events that occurred on the night of January 16-17, 1992, will be somewhat more detailed than would otherwise be required because this report will likely be the only opportunity that Mr. Ward will have to learn of the events that transpired on that night. It is particularly important with respect to the first complaint, which alleges that the shooting of Shayne Hawkes was an excessive use of force, to have relatively detailed description of the events that led up to the shooting in order to understand the context in which the shooting occurred.

Before describing the facts, it is worthwhile to give a brief description of the career of Corporal Magark. He entered the Force in April, 1974. After the completion of basic training, he was stationed in Sechelt, British Columbia where he carried out general duties. Beginning in 1977, he spent seven years in the enforcement of drug laws. He then spent two and one half years on general duty in the Richmond, B.C. detachment. While he was a member of the Richmond detachment, he became a member of the Emergency Response Team. As a member of the Emergency Response Team he was trained in the use of and issued a 9mm Sig-Sauer semi-automatic handgun. Beginning in 1986, he spent one year with the counter-terrorist team in Ottawa known as the Special Emergency Response Team. He has also served as an instructor in the use of firearms and the baton. During the five years preceding January, 1992, he was a member of the North Vancouver detachment of the RCMP where he performed general duties and in January, 1992, he was the officer in charge of the Burglary Section of the General Investigation Section. He is currently assigned to the Criminal Investigation Unit at Headquarters, "E" Division in Vancouver.

In the weeks that preceded January 16, 1992, a series of churches in North Vancouver had been broken into and property had been stolen from the churches. On the evening of

January 16, 1992, the Burglary Section devised a plan whereby each member of the Section would keep a church in North Vancouver under surveillance. The Section consisted of six members. Each member was in "plainclothes" and each was driving an unmarked police car. It was agreed that if any of the members observed suspicious activity around one of the churches that was under surveillance, the other members of the Section would be summoned by means of the police radio system. Constable Bligh Woodworth was assigned the responsibility of keeping the Sutherland Bible Chapel under surveillance. The Chapel is located on the 600 block of East 19th Street in the City of North Vancouver, British Columbia, between Sutherland Avenue and Grand Boulevard.

The events that transpired on the night of January 16-17, 1992, were the subject of testimony by the members of the Burglary Section who were directly involved and Constable Aspinall, a dog handler who was on duty in North Vancouver on that night. Transcripts of two radio communication channels which were being used by members of the North Vancouver detachment on that night, were also admitted into evidence as Exhibit "G". One transcript pertained to the main radio "Dispatch" channel that was being used by members of the North Vancouver detachment on the night of January 16-17, 1992. That transcript records the transmissions from 00.28 hours to 1:00 hours on January 17, 1992. The other transcript pertained to the "TAC II" channel that was being used by the members of the Burglary Section and it records the transmissions beginning at 00.24 hours on January 17, 1992. The police radio dispatcher apparently monitors this channel to the extent that her/his attention is not devoted to the Dispatch channel, however, general duty patrol members apparently do not normally monitor the TAC II channel.

During the evening of January 16, 1992, Constable Woodworth accompanied the pastor of the Chapel when the pastor locked up the Chapel at the conclusion of the evening's activities and everybody had left the Chapel. Every door and window was locked or secured. Constable Woodworth took up a position in his vehicle on 19th Street from which he could observe the front of the Chapel and a laneway that ran along the side of the Chapel. Shortly after midnight, Constable Woodworth observed a vehicle enter the laneway. Shortly thereafter, he observed a light come on in one of the front offices of the Chapel. He immediately left his police car and began walking toward the Chapel. As he was walking toward the Chapel, he could see two people walking around inside the Chapel. Further investigation by Constable Woodworth revealed a window had been broken and removed. He attempted to use his portable police radio to summon the other members of Burglary Investigation Section but his portable radio was not working consistently. Therefore he returned to his police car and used the radio located in his car to summon the other members. On returning to the Chapel, he observed a person moving about on the inside of the Chapel while using a flashlight.

In response to Constable Woodworth's radio call, Constables McInnis and Marks were the first members to arrive at the Chapel. Constable Woodworth directed them to go to the back of the Chapel. At the northwest corner of the Chapel, there is a stairway leading to a door into the Chapel. The constables observed a blue sports car parked near the

stairway at the back of the Chapel. They also observed several items located on the stairway. Using the Dispatch channel on his radio, Constable Marks communicated the license plate number of the blue sports car to the dispatcher for the purpose of determining whether the vehicle was stolen. Constable Hamilton, a general duty member who was monitoring the dispatch channel, immediately replied on the Dispatch channel that the vehicle license number transmitted by Constable Marks matched the license number of a stolen vehicle file that he was working on.

About 35 to 40 seconds after this radio transmission, Corporal Magark, who is travelling toward the Chapel in his car, makes a transmission on the Dispatch channel inquiring whether there is a "Bow-Wow" (meaning a police service dog) on duty. No reply was received by any member of the Burglary Investigation Section in response to this inquiry.

Two radio transmissions were also made on the TAC II channel, prior to Corporal Magark's arrival at the Chapel in which an inquiry is made about a police service dog. On the transcript, the following question is attributed to Constable Marks: "Perhaps have a dog?"

In his testimony, Constable Marks testified that this inquiry was likely made by another member of the Burglary section because he was using the Dispatch Channel rather than the TAC II channel at that time. The inquiry is followed immediately by a question from Constable Duffin, apparently addressed to Constable Woodworth, inquiring: "Do you want me out on foot?"

Constable Woodworth responded: "Ten four if you can and uh, perhaps have the dog here if possible."

No response is recorded on the transcripts with respect to either of these inquiries. All of the members of the Burglary Investigation Section who testified stated that they never heard a response to any of these inquiries and they assumed that a police service dog was not on duty on the night of January 16-17, 1992.

In fact, one or more of these inquiries had been monitored by one or both the police radio dispatcher or Constable Aspinall, was a dog handler who was on duty at that time. Constable Aspinall dispatched himself to the vicinity of the Sutherland Bible Chapel but did not arrive at the Chapel itself until after Shayne Hawkes had been shot. The role of police service dogs will be considered in greater detail later in this report.

Constables McInnis and Marks, who had taken up a position at the back of the Chapel, observed the door at the top of the stairway open and two males came out of the Chapel. One was carrying computer equipment. The other was carrying two bags. Constables McInnis and Marks identified themselves as police officers and immediately arrested the two males at gunpoint. Constable Marks immediately made a radio communication on the Dispatch channel advising that two persons were in custody. He also added: "... we're just going in for to make sure there's nobody else . . ."

This radio transmission occurs about 40 or 50 seconds after the radio transmission confirming that the vehicle parked at the back of the Chapel is stolen. By this time, Corporal Magark and Constable Duffin had arrived at the location of the Chapel and they had been briefly maintaining a perimeter surveillance around the Chapel in their respective vehicles. As soon as they heard Constable Marks' radio communication that two persons were in custody, they drove their vehicles to the scene of the arrest. Constable Duffin assisted Constable McInnis in putting handcuffs on one of the men who had just been arrested.

Both of the arrested men were known to the members of the Burglary Investigation Section. One of those arrested was Randy Wanek. Corporal Magark and Constables Duffin and McInnis each testified that each had dealt with Randy Wanek on many occasions. Corporal Magark knew that Randy Wanek had a lengthy criminal record. He also knew that Randy Wanek had a reputation for carrying firearms and being hostile and violent toward police officers. Corporal Magark had previously arrested Randy Wanek several years before this incident and on that occasion Randy Wanek had resisted arrest. Constable Duffin testified that he knew Randy Wanek as being a person who had committed armed robbery. Constable Duffin testified that he regarded Randy Wanek as being a person who should be dealt with by using the highest level of caution and a person who presented a physical risk to the members. Constable Marks considered Randy Wanek to be dangerous. Constable Marks testified that he had previously had experience with Randy Wanek and that on some occasions he had been aggressive toward the police officers. The members assumed that any accomplices of Randy Wanek, who might still be in the Chapel, would likely have many of the same characteristics as Randy Wanek and consequently any suspects should be regarded as dangerous. The other person who was arrested outside the Chapel was Mike Arnold. He was also known to Corporal Magark and was regarded as a suspect in many crimes of breaking and entering and other crimes in North Vancouver.

Corporal Magark and Constable McInnis questioned Randy Wanek and Mike Arnold about whether there was anybody else in the Chapel. Both responded that there wasn't anybody else in the Chapel. Notwithstanding these responses, Corporal Magark, Constable Marks and Constable Duffin proceeded immediately to the rear stairway of the Chapel for the purpose of conducting a search of the Chapel for additional suspects. The remaining members of the Burglary Investigation Section remained outside the Chapel for the purpose of maintaining physical custody of Randy Wanek and Mike Arnold. None of the cars which were being used by the members of the Section were equipped in a manner whereby a prisoner could be held in relatively secure custody in the back seat. Corporal Magark testified that there was no discussion of how the Chapel would be searched. Constable Duffin testified that he was concerned that if there were additional accomplices in the Chapel, they could escape from the Chapel through a door or window that the members did not have covered.

Corporal Magark, and Constables Marks and Duffin drew their respective firearms upon entering the Chapel. In the words of Constable Duffin, a search in these circumstances was a "high risk situation". Corporal Magark testified that he had been trained during his basic recruit training, as a member of the Special Emergency Response Team and at courses on Officer Survival, that the best defence against an unexpected attack is for an officer to have his firearm drawn and in a ready position. Following this training, he held his firearm at the "ready" but not with his finger on the trigger. Constable Duffin searched the lower floor of the Chapel. Corporal Magark and Constable Marks searched the upper floor that contained the sanctuary, some offices and the washrooms. They commenced their search by searching the front portion of the Chapel including the sanctuary where the pews are located. They proceeded toward the rear of the Chapel where they searched some offices, a cloakroom, and the women's washroom. At this stage of their search, they had searched the entirety of the upper floor except the men's washroom. They approached the men's washroom and Corporal Magark turned on two light switches that were located outside the washroom. He opened the door enough to determine whether anybody was readily visible in the washroom. He did not see anybody. Corporal Magark entered the men's washroom. Constable Marks was behind Corporal Magark but he remained in the doorway leading to the washroom. The washroom is about seven feet wide and eleven feet long. As they entered the washroom, both members had a complete view of the washroom except for the interior of the toilet cubicle. A metal partition separates the toilet from the rest of the washroom. The bottom of the metal partition is about twelve to fifteen inches above the floor. This partition is depicted in photograph 16 of Exhibit "B". The door to the toilet cubicle was mostly closed but was ajar by a few inches. They could both see under the metal partition of the toilet cubicle and neither saw anybody's feet. Constable Marks concluded that if there was anybody hiding in the washroom, the only place the person could be was standing on the toilet or sitting on the top of the toilet tank. In his written statement, admitted as Exhibit "J", Corporal Magark stated that he did not hear any movement or noise from inside the men's washroom. In the opinion of both Corporal Magark and Constable Marks, anybody who might be secreted in the toilet cubicle would have heard the noises immediately outside the men's washroom including police radios, car engines, and voices other than those of Wanek and Arnold. A person in the washroom would also have heard the opening of doors immediately outside the washroom. Corporal Magark testified that he had formed the opinion that if there were accomplices inside the Chapel, they were aware of the presence of the police and they had decided not to surrender to the police.

Corporal Magark walked toward the toilet cubicle. In his written statement, Corporal Magark stated that when he was a few feet away from the toilet cubicle, he crouched down and tried to look under the metal partition of the toilet cubicle to determine whether there was anyone in the toilet cubicle. He did not see anyone. He stood upright and holding his firearm out in front of him in a two handed grip with his index finger on the frame outside the trigger guard, he used his right foot to push the cubicle door open. In doing so, he stepped inside the cubicle with his right foot. In his estimation, about two thirds of his body was inside of the cubicle after his foot came to rest on the floor. At the hearing, he testified at page 239 of the transcript:

> "And my foot no sooner hits the floor and I have a person on top of me that is attacking me."

At page 240 of the transcript, beginning at line 6, in response to a question of what he observed as he stepped inside the toilet cubicle, he testified:

> "My foot hits the floor, the individual is coming off the top of the toilet. When I say the top of the toilet, the seat would be on the bottom porcelain part and his upper body would have been in the area of the letter "A" on the back part of the toilet."

And on page 306 of the transcript beginning at line 5:

> "There's a lot of porcelain in a toilet. What I meant by that his feet were on the seat portion and I couldn't determine whether his rump or where the rest of his body was, but it was certainly behind that. And he appeared to be crouched -- uncoiling position in a forward motion coming at myself."

And further on page 240 of the transcript, beginning at the end of line 13:

> "His hands were in front of me. I can't determine if they were fully extended. He had gloves on. I couldn't determine if he had a weapon in there. And at that point that I deliberately squeezed one round off and it struck him in the upper body."

In his written statement that was admitted as Exhibit "J", Corporal Magark stated at page 8:

> "I immediately observed the figure of an adult male, crouched on top of the toilet seat, with his arms and hands extended out in front. He was uncoiling and commencing to leap at me. . . . He was in the process of leaping at me, not giving up. I had no time to make any verbal commands. I believed that he probably had a weapon, or housebreaking instrument capable of being used as a weapon. I believed similarly, that he probably had such a weapon in his hand as he was reaching towards me. I did not have the luxury of sufficient time to check to see if in fact my belief was accurate. I was also concerned that with or without a weapon, this individual would be able to gain control of my firearm and use it against myself or Constable Marks."

And on page 9 of his statement, he said:

> "As this adult male started to leap towards me, I had only time to stop, try to lean back away from his extended arms, and fire off one round. I did

not have time to step out of the cubicle. I fired into the upper body area. I was not trying to cause death. I had no time to determine where I should shoot. The attacker dropped instantly to the floor, face down at my feet."

Several supplementary questions were put to Corporal Magark during the investigation of this matter by W. R. Bennett. Question Four related to where Shayne Hawkes landed after being shot. Corporal Magark's written response was admitted as Exhibit "L". It states:

> "4. . . . He fell onto my lower body (waist down), prior to striking the floor. When I saw him coming towards me ... I had time to lean back, pull my firearm in towards my chest and fire one round. As I had pulled my upper body away, it was my lower body that he fell onto."

And on page 10 of his statement (Exhibit "J"), he said:

> ". . . I believed that I was in danger of serious bodily harm from Mr. Hawkes. ... I believed the force I used was necessary in the circumstances to defend myself. If I had waited to determine if in fact Mr. Hawkes had a screwdriver in his hand, and he did, it would have been too late. I may well have been seriously injured and/or lost control of my weapon."

At the hearing, Corporal Magark responded affirmatively to the following question at page 241 of the transcript (beginning at line 1):

> Question: "Is it fair to say that the minute you swung the door open with your foot and stepped in, that you saw the person there, that you pulled the trigger almost immediately when you saw this individual lunging at you or going for you? That was done almost immediately?"
>
> Answer: "Yes."

And on page 246-7, beginning at line 30:

> Question: ". . . I wonder if you could explain to us in terms of time approximately how many seconds this transaction took? That is to say when you decided to enter the cubicle and thereafter fire on the individual that was there. Do you have an approximate -- in terms of time. It could be seconds, milliseconds or what?"

Answer: "From the time my foot struck the floor it would have been within a second."

In both his testimony and in his written statement, Corporal Magark stated that he was concerned that the person on the toilet might be trying to grasp his weapon and use it against himself or Constable Marks. He concluded his written statement with the following sentences:

> "If I had waited to determine if in fact Mr. Hawkes had a screwdriver in his hand, and he did, it would have been too late. I may well have been seriously injured and/or have lost control of my weapon."

Constable Marks was the only eye-witness to the events that occurred in the men's washroom. He testified that he observed Corporal Magark push the door of the toilet cubicle open and take one step inside the cubicle. He testified at page 454 of the transcript beginning at line 4:

> ". . . he opens the door, he steps inside, a right foot comes down and pretty much simultaneously to his right foot coming down a shot is fired. There is one (1) single shot."
>
> "Within a very, very, very short time Mr. Hawkes comes slumping forward -- falls forward into Corporal Magark's arms. Corporal Magark catches him, brings him -- you know he has a hold of him, takes him to the wall, eventually takes him to another wall."

He then observed Shayne Hawkes go to the floor outside the toilet cubicle with Corporal Magark holding on to him.

After Shayne Hawkes was on the floor, Corporal Magark testified that he asked him whether he had any weapons on him and Hawkes replied by saying "No." At that point, Corporal Magark turned him over and saw that there were no weapons in the hands of Shayne Hawkes.

Immediately after Corporal Magark ascertained that Shayne Hawkes did not have any weapons on his person, he began to apply first aid by means of a compress bandage over the wound. Constable Marks immediately used his portable radio on the Dispatch channel to call for Emergency Health Services. An ambulance arrived within minutes and Shayne Hawkes was taken to Lions Gate Hospital.

All of these events occurred in a very short period of time. The length of time that was taken to conduct the search of the Chapel before Corporal Magark discovered Shayne Hawkes in the men's washroom was only a few minutes and can be determined by the lapse of time between Constable Marks radio transmission advising that two suspects were in custody and that they were going to search the Chapel and his radio transmission

requesting an ambulance. This period was approximately two minutes. Corporal Magark estimated that the interval from the time when he arrived at the Chapel until the ambulance was called amounted to three or four minutes. Constable Woodworth estimated that the interval between the time when he summoned the other members of the Section until the time when Shayne Hawkes was shot was perhaps five minutes.

After hearing a shot from inside the Chapel, Constable Woodworth turned his prisoner over to Constable Hamilton, who had just arrived, and entered the Chapel with Constable Seymour who had also arrived. Constable Seymour took custody of Shayne Hawkes and accompanied him to the hospital.

6. COMPLAINT ALLEGING THE EXCESSIVE USE OF FORCE

The first complaint alleges that Corporal Magark used excessive force in the conduct of the performance of his duties in relation to Mr. Shayne Hawkes on or about January 17, 1992. When Corporal Magark became aware of evidence that a crime had been committed at the Sutherland Bible Chapel on January 16-17, 1992, he was, in the language of section 25 of the Criminal Code, required and authorized to investigate and apprehend those responsible for the crimes.

6.1 Issues and Findings

The complaint with respect to the excessive use of force raises three questions:

(a) Was it an excessive use of force for Corporal Magark, who was the director of the Burglary Investigation Section, to conduct an immediate search of the Sutherland Bible Chapel following the arrest of Wanek and Arnold by using police personnel rather than waiting for the arrival and assistance of a police service dog?

(b) Was it an excessive use of force for Corporal Magark to draw his handgun while conducting the search of the Sutherland Bible Chapel?

(c) Was it an excessive use of force for Corporal Magark to fire his handgun at Shayne Hawkes whom he discovered in the toilet cubicle of the men's washroom in the Sutherland Bible Chapel?

In the following sections of this report, findings are made with respect to each of these issues.

6.1.1 Use of Police Personnel rather than Police Service Dog to Conduct Search

During his argument, Commission counsel submitted that it would have been more prudent and reasonable for Corporal Magark, who was the director of the Burglary Investigation Section, to have used a police service dog for the purpose of conducting a search of the Sutherland Bible Chapel for suspects on January 17, 1992. Commission

counsel submitted that the question must be addressed whether Corporal Magark, by deciding to conduct the search of the Chapel in general and the toilet cubicle of the men's washroom in particular, by using police personnel, had inevitably placed himself in the position of having to discharge his gun when he was surprised by the discovery of Shayne Hawkes inside the cubicle. By implication, the proposition was asserted that if this question was answered in the affirmative, the shooting of Shayne Hawkes by Corporal Magark was an excessive use of force.

In examining this proposition, it is necessary to consider:

(a) the abilities of police service dogs to search for suspects in a building;

(b) whether Corporal Magark

  (i) knew or should have known that a police service dog was on duty and available in the North Vancouver detachment at the time of the search of the Sutherland Bible Chapel, and

  (ii) he should have postponed the search of the Chapel until a police service dog arrived from either the North Vancouver detachment or another detachment; and

(c) whether, if a police service dog had been used to conduct the search of the Chapel, the shooting of Shayne Hawkes would necessarily have been avoided.

(a) Abilities of Police Service Dogs

With respect to the ability of police service dogs to conduct searches of buildings for suspects, Commission counsel tendered the evidence of Staff Sergeant R. C. Fawcett as an expert witness with respect to the capabilities of police service dogs and the techniques for using police service dogs to search a building for suspects. Constable Aspinall, who was a dog handler stationed in the North Vancouver detachment at the time of the subject matter of the complaint, also gave testimony with respect to how he would have conducted a search of the Sutherland Bible Chapel.

The qualifications of Staff Sergeant Fawcett as expert with respect to the abilities of police service dogs was admitted by Mr. Ball and Ms. Frost. Staff Sergeant Fawcett has been a dog handler with the RCMP since 1969 and since 1989 he has been the Police Dog Supervisor for "E" Division of the RCMP in British Columbia.

Staff Sergeant Fawcett's testimony may be summarized as follows:

(1) Police service dogs are trained to conduct searches of buildings.

(2) A dog will search a building untethered by a leash but in the company of the dog handler. The dog is controlled by means of verbal commands given by the handler.

(3) The dog locates the presence of a person almost totally by detecting scent.

(4) The fact that other suspects or persons have recently been in a building is irrelevant to the police service dog's ability to locate a suspect.

(5) If the dog detects the presence of a person, the dog will alert the handler in one of a number of ways that depend on the character of the dog and the physical surroundings. The dog may bark or indicate the presence of a person by the manner in which the dog's ears or tail picks up. If the person is behind a closed door, the dog may scratch on the door or put her/his nose to the crack in the door.

(6) When the presence of a suspect has been identified, the dog handler will normally identify herself/himself as a police officer and give the suspect an opportunity to surrender.

(7) If the suspect makes an overt action toward either the dog or the dog handler, the dog is taught to protect himself and the dog handler by biting the suspect until commanded to stop.

(8) If the suspect does not surrender, the dog handler may either attempt to arrest the person or may summon additional members to assist with the arrest. The choice between these alternatives will depend on a variety of circumstances including the dog handler's knowledge of the characteristics of the suspect and the physical surroundings.

(9) Part of the training of members of the Force is to acquaint members with the abilities of police service dogs. This is accomplished in recruit training, in-service training programs, and watch briefings and section briefings.

(10) The decision with respect to whether or not a police service dog could be utilized in a search is a matter of liaison between the dog handler. The investigator makes the decision to request the use of the dog but the dog handler makes the final decision on whether or not to use the dog.

The RCMP Operational Manual, Chapter II.6 on Specialized Support, under the heading of "E. Investigative Techniques" and sub-heading "8. Police Service Dogs" provides in paragraph "d. Investigations":

> "1. If you require the services of a police dog team, state the nature of the investigation and the conditions under which the police dog will have to work."

Staff Sergeant Fawcett testified that where police service dogs have been utilized to conduct searches of buildings for suspects, their success rate is in excess of 90%. However, he acknowledged that more often than not searches of premises are conducted without the assistance of a dog.

(b) Was it unreasonable for Corporal Magark to conduct the search without waiting for a police service dog?

The question of whether it was unreasonable for Corporal Magark to conduct a search of the Chapel without waiting for the assistance of a police service dog raises two sub-questions. First, did Corporal Magark know or should he have known that a police service dog was on duty and available in the North Vancouver detachment at the time of the search of the Sutherland Bible Chapel. Second, if he reasonably assumed that a police service dog was not on duty in the North Vancouver detachment, should Corporal Magark have waited for the arrival of a police service dog from another detachment before conducting a search of the Chapel.

With respect to the first sub-question, evidence was adduced about an inquiry made by Corporal Magark by means of the Dispatch radio channel prior to the search of the Chapel with respect to whether a police service dog was on duty. Inquiries were also made by other members of the Burglary Investigation Section on the TAC II channel prior to conducting the search of the Sutherland Bible Chapel with respect to whether a police service dog should be used. It is clear from the testimony and the transcripts of radio transmissions that Corporal Magark never received a response to this inquiry. Corporal Magark gave the following testimony at page 304 of the transcript in response to a question from Commission counsel about whether he knew a police service dog was available:

> "I don't exactly know if there was a Dog Master on that night, and I never heard, while monitoring the dispatch channel, of a Dog Master going to calls or attending them. That doesn't mean that he wasn't. I'm just telling you I didn't hear that. And I never received any response on the channel I was operating on . . . ."

Other members of the Burglary Investigation Section also testified that they never heard any response to any of the inquiries by the members Section about the availability or use of a police service dog.

In fact, Constable Aspinall and his police service dog were on duty. Constable Aspinall was monitoring the police dispatch channel when he heard the request for a police service dog. He dispatched himself to the 19th and Grand Boulevard by simply pushing a button on his computer. Pressing this button shows up on the police dispatcher's computer screen and indicates that Constable Aspinall and his dog are responding to the request for a police service dog. Apparently, none of the cars of the Burglary Investigation Section

were equipped with computer assisted dispatch. Therefore, they had no way of knowing that Constable Aspinall was on his way to the scene. Constable Aspinall did not acknowledge his response by radio because there was a lot of radio traffic at that time that he did not want to interrupt.

When Constable Aspinall heard the request for a police service dog, he also heard a request for a perimeter to be set up using Grand Boulevard and 19th as one of the coordinates. He was about two miles or two and one-half miles from that location. He traveled to that location which took him about a couple of minutes. He did not have precise information with respect to where the members of the Burglary Section were located. He stopped his car about one block away from Chapel and waited for further instructions. When he heard a reference to the Chapel on his radio, he left his car and walked to the Chapel. When he arrived at the Chapel, the shooting had already occurred.

Notwithstanding that he did not receive a response to his radio inquiry, should Corporal Magark otherwise have been aware that Constable Aspinall and his dog were on duty on the night of January 16-17, 1992? In January 1992, the North Vancouver detachment had three police service dogs. Each dog is assigned to a handler. Because of days off, training and holidays, it was not uncommon that none of the three dog handlers would be on duty. Both Constable Aspinall and Constable Woodworth testified it was not customary practice for the dog handler to attend watch or section briefing sessions where members could routinely be advised that a police service dog was on duty and available. Constable Aspinall explained that watch briefings or section briefings of other members normally occur before the shift of the dog masters begins.

Finding #1:

The Commission finds that Corporal Magark did not know nor should he have known that a police service dog was on duty in the North Vancouver detachment and available at the time when the search of the Sutherland Bible Chapel was commenced. Corporal Magark's conclusion that no police service dog was on duty in North Vancouver was a reasonable inference to be drawn from the lack of any response by radio to his inquiry about whether a police service dog was on duty.

Even if Corporal Magark reasonably assumed that no police service dog was available from within the North Vancouver detachment, should he have postponed the search of the Chapel until a police-service dog and its handler were brought in from another detachment? Staff Sergeant Fawcett testified that the RCMP prefers to use its own police service dogs rather than requesting one of the adjacent municipal forces to bring in one of their dogs. He also testified that RCMP police service dogs are stationed in Richmond, Burnaby and Surrey. Various estimates were given with respect to the time that would be required to bring a police service dog from another detachment to North Vancouver. The time would vary depending on the time of day, the traffic, and the location of the dog in

the other detachment. At a minimum, it would probably have taken twenty minutes and it might have taken longer.

Staff Sergeant Fawcett was asked by Commission counsel to comment on several portions of Corporal Magark's written statement (admitted as Exhibit "J"). Corporal Magark stated:

> "My experience and training has been to search buildings first, and if no suspects are found, then to call the dog master. My experience is that the dog and dog master will not be able to cover an area such as this as quickly or quietly as police personnel can and that the dog probably would be confused by the various fresh tracks already left inside by Wanek and Arnold."

Without commenting on the specific search of the Sutherland Bible Chapel, Staff Sergeant Fawcett expressed his opinion that generally a dog can conduct a search more efficiently than police personnel because of the dog's ability to detect a person with her/his nose whereas a police officer usually must rely on her/his eyes. He also reiterated that a dog would not be confused by fresh tracks of other suspects who have already been apprehended.

The RCMP Operations Manual, Chapter II.6 on Specialized Support, under the heading of "E. Investigative Techniques and the sub-heading of "8. Police Service Dogs" provides in paragraph "d. Investigations":

> " 2. Protect the scene from being contaminated by another human scent."

Perhaps paragraph 2 confused Corporal Magark with respect to the effect of Messrs. Arnold and Wanek having recently been in the Chapel.

Staff Sergeant Fawcett testified that the decision of whether or not to request the assistance of a police service dog is the decision of the investigating member. If there were other accomplices in the Chapel, the Burglary Investigation Section did not have enough members immediately available to surround the Chapel and prevent the accomplices from escaping or to prevent any accomplices from attacking the officers in an attempt to enable the two arrested suspects to escape. If other suspects were in the Chapel and they escaped, they might have been armed and a danger to community particularly if they were being pursued by the police. If it had turned out that no accomplices were in the Chapel, which was the information that had been given to Corporal Magark by the two arrested suspects, Wanek and Arnold, it would have been a frivolous use of resources to bring a police service dog from another detachment and in the meantime keep the Chapel surrounded by members until the dog arrived. Staff Sergeant Fawcett testified that most building searches by members of the RCMP take place without the assistance of a dog. There are circumstances where it would make good sense to wait for the arrival of a police service dog before conducting a search of a

building. However the decision of Corporal Magark and the members of the Burglary Investigation Section, based on the circumstances known to them at that time, to conduct a search of the Sutherland Bible Chapel without waiting for the assistance of a police service dog was not unreasonable conduct. If every search for a possible suspect was delayed until the arrival of a police service dog, the RCMP would require a great many more police dogs.

Finding #2:

The Commission finds that the decision of Corporal Magark to conduct a search of the Sutherland Bible Chapel on the night of January 17, 1992, without waiting for the assistance of a police service dog was not an unreasonable decision based on the circumstances known to Corporal Magark at the time when the search was commenced.

(c) If a police service dog had been used to conduct the search, would the shooting of Shayne Hawkes necessarily have been avoided?

The question of whether, if a police service dog had been used to conduct the search, the shooting of Shayne Hawkes would necessarily have been avoided is a matter of speculation.

A hypothetical question was put to Staff Sergeant Fawcett with respect to how he would conduct a search of a building like the Sutherland Bible Chapel and what he would have done if his dog had detected a person in the toilet cubicle of the men's washroom. Prefacing his remarks by stating that he had the benefit of the wisdom of hindsight, he gave the opinion that if he was satisfied that the suspect had no means of escaping from the washroom, he would have called his dog outside the washroom and summoned the assistance of other members. However, he acknowledged that if the dog handler was surprised by a suspect in a building and the suspect made an aggressive move toward the dog handler, the dog handler, who would normally have his gun drawn, might well shoot the suspect.

Commission counsel put the same hypothetical to Constable Aspinall. His approach would have been somewhat different than Staff Sergeant Fawcett. If his dog indicated that somebody was in the toilet cubicle of a washroom, the dog would go into the toilet cubicle after the suspect by going under the partition if necessary. The dog would attempt to haul the suspect out of the cubicle by biting the first thing that the suspect offered to the dog whether it be an arm, foot or a leg. Constable Aspinall, who would have had his gun drawn, would have backed up his dog by going into the toilet cubicle with the dog. Constable Aspinall would not release the dog from the suspect until he had the suspect under control. In Constable Aspinall's experience, the suspect usually gives up after the dog bites the suspect but he has had occasions where a suspect has fought the dog.

Under Constable Aspinall's response to the hypothetical question, it appears highly probable that Shayne Hawkes would have been bitten by the dog. Constable Aspinall would have followed the dog into the cubicle and if Shayne Hawkes had lunged at Constable Aspinall rather than surrender, Constable Aspinall might have used his handgun to protect himself and his dog.

If a police service dog is used to conduct a search, the police dog handler and other officers are less likely to be taken by surprise by the presence of a suspect in a hiding place but a suspect may still seek to gain an advantage by surprising the officer. When a suspect's location is identified by a police service dog, the suspect may and often does surrender but some suspects may still attack the dog and the members who are present. Suspects do not always think and act rationally in these circumstances particularly where their mental faculties are impaired by alcohol or drugs.

Finding #3:

The Commission finds that no clear conclusion can be drawn that if a police service dog had been used to conduct the search of the Chapel the shooting of Shayne Hawkes would necessarily have been avoided.

(d) Could communications be improved?

It is almost trite to suggest that communications could be improved. Communications can always be improved. If Corporal Magark and the other members of the Burglary Investigation Section had known that Constable Aspinall and his police dog were on duty and located within a few minutes from the Sutherland Bible Chapel, they might have decided to use the assistance of the police service dog in conducting the search. Constable Woodworth testified that if a police service dog had been available, he would have preferred to have the dog conduct the search. Constable Duffin testified that if a police service dog had arrived prior to the commencement of the search by the members, he would have felt it necessary to consider whether to search the Chapel with or without the assistance of a police service dog. Prior to any of the members entering the Chapel, Corporal Magark had inquired whether a police service dog was on duty.

Some measures could be taken, if they have not already been taken, to ensure that members of a detachment are made aware of when a police dog is available to assist members of a detachment. The Commission heard evidence that the number of police dogs assigned to the North Vancouver detachment has been increased. This will mean that it is more likely that a police dog and handler will be on duty around the clock in North Vancouver. However, there will likely be times in North Vancouver and there will certainly be times in other detachments when no police dog is readily available. It may be helpful at watch briefings or section briefings to advise members whether a police service dog will be on duty during that shift or part of a shift. Another way in which communications could be improved is to attempt to ensure that when an inquiry is

received from a member by radio with respect to the availability of a police dog, the response is also communicated by radio. The day may come when all police vehicles and officer are equipped with computers that will enable them to determine whether a police dog is on duty and has been dispatched to aid their investigation but in times of fiscal restraint that is unlikely to occur in the immediate future.

6.1.2 Drawing of Handgun to Conduct Search

An unlawful break and entry of the Sutherland Bible Chapel had just occurred. Two suspects had just been arrested when they attempted to leave the Chapel carrying goods that were apparently stolen. Both of these suspects were known to the members by reason of their previous criminal records. One of the suspects, Randy Wanek, was known to be dangerous. The vehicle which the suspects were apparently using was ascertained by the members of the Section to be a stolen vehicle. This information constituted reasonable grounds for Corporal Magark and the other members to suspect that any accomplices who might be hiding in the Chapel may be armed and may seek to avoid apprehension by attacking the members.

Finding #4:

Taking into account the information possessed by Corporal Magark and the other members prior to commencing the search of the Sutherland Bible Chapel, the Commission finds that the drawing of a handgun from its holster and having it at the ready while conducting a search of the Chapel was not an excessive use of force by Corporal Magark or any of the other members who participated in the search.

6.1.3 Firing of Handgun at Shayne Hawkes

Whether Corporal Magark's action in firing his pistol at Shayne Hawkes was an excessive use of force requires an examination of the evidence in relation to the principles of law that govern the use of force by police officers.

While he was conducting a search of the Sutherland Bible Chapel for additional suspects, Corporal Magark entered the men's washroom. He testified that nobody was immediately visible within the washroom. He crossed the washroom and pushed open the door of the toilet cubicle with his right foot and stepped into the toilet cubicle with one foot. He testified that when his foot hit the floor a person, who was crouched on top of the toilet, lunged at him with his hands extended in front of him. The person who lunged at Corporal Magark was Shayne Hawkes.

Shayne Hawkes did not appear to give testimony at the hearing notwithstanding that he knew that the hearing was proceeding. I ruled that the statement that he had given to an RCMP officer, who was investigating these events, was inadmissible for the reasons stated earlier in this report. If Shayne Hawkes had given testimony, the only room for

any conflict with the testimony of Corporal Magark would be whether Shayne Hawkes lunged at Corporal Magark when the latter entered the toilet cubicle or whether Shayne Hawkes remained crouched or seated on the toilet without making any threatening movements or gestures toward Corporal Magark.

The Commission can only make findings on the basis of admissible evidence. The only direct evidence before the Commission with respect to the events that transpired within the toilet cubicle is the evidence of Corporal Magark who stated that Shayne Hawkes lunged at him with Hawkes' hands extended in front of him. In his written statement (Exhibit "J" at page 8) Corporal Magark stated that he:

> ". . . believed that he probably had a weapon, or housebreaking instrument capable of being used as a weapon. I believed similarly, that he probably had such a weapon in his hand as he was reaching towards me."

Corporal Magark reacted almost immediately by firing a single shot at Shayne Hawkes with his pistol. After Shayne Hawkes was shot, the evidence of Corporal Magark was that Shayne Hawkes fell against the lower part of Corporal Magark's body.

A pivotal question in this inquiry is whether or not Shayne Hawkes lunged at Corporal Magark as stated by Corporal Magark. The circumstantial evidence is consistent with Corporal Magark's testimony. The circumstantial evidence includes the design and dimensions of the toilet cubicle, the testimony of Constable Marks and the location of blood on the floor of the washroom.

The dimensions of the toilet cubicle and the location of the toilet within the cubicle are significant. The cubicle is located along the entire length of the wall that is opposite to the entry door to the men's washroom. Viewed from the entry door to the washroom, the doorway to the cubicle is at the right end of the cubicle. When a person enters the cubicle, the toilet is not located immediately behind the door as is the case with many toilet cubicles but rather it is necessary to make a left turn and the toilet is located against the wall at the far end of the cubicle. The overall dimensions of the cubicle are 6 1/2 feet along the rear wall of the washroom and 2 1/2 feet in depth. The distance from the back of the toilet tank to the front of the toilet bowl is 27 inches. When the cubicle door is fully opened, there is at least 4 feet between the front of the toilet bowl and the cubicle door when it is in its fully open position.

The testimony of Constable Marks, who was standing in the doorway leading to the men's washroom, was that after Shayne Hawkes was shot, he observed the body of Shayne Hawkes fall against Corporal Magark. The latter caught Shayne Hawkes and held him for a very brief time in a standing position inside the cubicle before they both went to the floor outside the toilet cubicle. Shayne Hawkes bled profusely from the bullet wound in his shoulder. This is clear from the photographs, which were admitted in evidence as Exhibit "B" and particularly photograph 16. This bleeding likely began almost instantaneously after the penetration of the bullet. All of the blood is located outside the

toilet cubicle where, according to the testimony of both Corporal Magark and Constable Marks, Shayne Hawkes landed after brushing past Corporal Magark.

If Shayne Hawkes had been shot while he was sitting on the toilet tank or perched in a crouched position with his feet on the toilet seat, it is unlikely that after having been shot, he would have landed against Corporal Magark who was standing approximately four feet away in the doorway to the cubicle and that he would land, according to Constable Marks, in a standing position. If Shayne Hawkes had been struck by the force of a bullet while seated or standing on the toilet, it is more likely that Shayne Hawkes would have slumped to one side or the other of the toilet and he would have lost blood in the toilet cubicle. This did not occur.

Finding #5:

The Commission finds that Corporal Magark discharged his pistol when he observed Shayne Hawkes lunging at him.

Whether or not Corporal Magark's use of force was excessive must be determined in relation to the law pertaining to the use of force by police officers. Section 25 of the Criminal Code provides:

> "25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (b) as a peace officer or public officer,
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose."

The use of force that is authorized by section 25 (1) is subject to subsection (3) and this will be dealt with later.

With respect to the issue of whether Corporal Magark was "doing what he is required or authorized to do", section 27 of the Criminal Code provides that every one, including a police officer, is justified in using as much force as is necessary

> "(a) to prevent the commission of an offence
>
> (i) for which, if it were committed, the person who committed it might be arrested without warrant, and
>
> (ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a)."

All of the prerequisites to the use of force under section 27 were satisfied when Shayne Hawkes lunged at Corporal Magark. Corporal Magark was justified in using as much force as necessary to prevent anything being done, where he, on reasonable grounds, believes will result in the commission of an offence for which a person might be arrested without warrant that is likely to cause immediate and serious injury. The act by Shayne Hawkes of lunging at Corporal Magark, if he strikes Corporal Magark, would constitute the commission of the offence of assaulting a peace officer contrary to section 270 of the Criminal Code. That offence is one for which a person may be arrested without warrant. The offence was one that is likely to cause immediate and serious injury to the officer. Therefore, Corporal Magark was justified in using as much force as necessary to prevent the commission of that crime.

Section 495 of the Criminal Code authorizes a peace officer to arrest a person he either finds committing a criminal offence or whom he believes on reasonable grounds has committed an indictable offence. Pursuant to section 9 of the Royal Canadian Mounted Police Act, Corporal Magark is a peace officer. On the basis of the evidence recited in Part 5 of this report, Corporal Magark had reasonable grounds to believe that the offence of breaking and entering had taken place at the Sutherland Bible Chapel. When he discovered a person hiding in the toilet cubicle who was not authorized to be in the Chapel, I find that Corporal Magark had reasonable grounds to believe that the person whom he discovered in the toilet cubicle had committed the indictable offence of breaking and entering contrary to section 348 of the Criminal Code. Therefore, Corporal Magark was authorized to arrest Shayne Hawkes. Pursuant to section 25(1) of the Criminal Code, Corporal Magark was justified in using as much force as necessary to arrest Shayne Hawkes for both of these offences.

The use of force that is authorized by section 25(1) is subject to subsection (3). Subsection (3) provides:

"(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm."

Notwithstanding Corporal Magark's testimony that he did not intend to cause the death of his assailant, there is no doubt that he intended to cause grievous bodily harm. Therefore, his use of force would not be justified unless he believed on reasonable grounds that his intended use of force was necessary for the purpose of preserving himself from death or grievous bodily harm.

In R. v. Bottrell (1981), 22 C.R. (3d) 371 (B.C.C.A.), the British Columbia Court of Appeal interpreted and expressed its opinion on the proper application of section 25. That case involved two charges of assault causing bodily harm against a police officer in relation to the force used to apprehend an individual. At page 380, Anderson J.A., writing the judgment of the Court, articulated several principles to assist triers of fact in properly applying section 25. Several of these principles are relevant to this inquiry.

With respect to the question of whether an officer has reasonable grounds for believing that the use of force that is intended to cause grievous bodily harm is necessary for the purpose of preserving himself, Anderson J.A. in R. v. Bottrell (1981), 22 C.R. (3d) 371 at page 380 (B.C.C.A.), stated:

> "(6) It is the belief of the police officer in the light of all the circumstances that is important."

Corporal Magark's evidence with respect to his belief is summed up in the following quotation from page 10 of his statement (Exhibit "J"):

> "I believed that I was in danger of serious bodily harm from Mr. Hawkes . . . . I believed the force I used was necessary in the circumstances to defend myself. If I had waited to determine if in fact Mr. Hawkes had a screwdriver in his hand, and he did, it would have been too late. I may well have been seriously injured and/or lost control of my weapon."

Finding #6:

The Commission finds that Corporal Magark believed on reasonable grounds that it was necessary to discharge his pistol for the purpose of preserving himself from death or grievous bodily harm.

A question that must be addressed under both section 25 and 27 of the Criminal Code is whether Corporal Magark used more force than was necessary. With respect to this question, Anderson J.A. in R. v. Bottrell (1981), 22 C.R. (3d) 371 at page 380 (B.C.C.A.), stated:

> "(4) In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude."

The relevant circumstances that existed at the time when Corporal Magark fired the shot at Shayne Hawkes were:

- Randy Wanek, who had been arrested outside the Chapel, was known by Corporal Magark to have a criminal record for violent offences and to behave aggressively toward police officers;

- As soon as Corporal Magark pushed open the door of the toilet cubicle and stepped into the cubicle, he observed a person lunging at him from a crouched position on top of the toilet;

- Corporal Magark "... couldn't determine if he [Hawkes] had a weapon ..." (page 240 of the transcript, beginning at the end of line 13);

- Corporal Magark "... believed that he probably had a weapon, or housebreaking instrument capable of being used as a weapon. I believed similarly, that he probably had such a weapon in his hand as he was reaching towards me." (Exhibit "J" at page 8.)

- Corporal Magark had only a fraction of a second to make the decision on whether or not to shoot before the suspect would be on top of him. In his statement (Exhibit "J" at page 8), he said:

> "I believed similarly, that he probably had such a weapon in his hand as he was reaching towards me. I did not have the luxury of sufficient time to check to see if in fact my belief was accurate. I was also concerned that with or without a weapon, this individual would be able to gain control of my firearm and use it against myself or Constable Marks."

The crucial issue is whether the discharge by Corporal Magark of his firearm was the use of more force than is necessary when he had not actually seen a weapon in the possession of his assailant notwithstanding that he believed that his assailant probably had a weapon of some kind. If Shayne Hawkes had been holding a gun, a knife, a screwdriver or other bladed weapon in one of his hands as he was lunging at Corporal Magark, I would not have any doubt that Corporal Magark was justified in firing his pistol at his assailant. If it had turned out that Shayne Hawkes had been holding a gun or bladed weapon in one of his hands as he was lunging at Corporal Magark, then, notwithstanding that Corporal Magark had not seen the weapon, I suspect that few would have questioned the propriety of Corporal Magark's action in firing his pistol at his assailant. But Corporal Magark had not seen any weapon and Shayne Hawkes was not in fact carrying any weapon.

I accept that when Corporal Magark saw Shayne Hawkes unexpectedly lunging at him from the toilet, Corporal Magark believed his assailant probably had some form of weapon in his hand. His belief was not an unreasonable assumption based on all of the circumstances that were present on that night. He knew that Randy Wanek who had been arrested outside was dangerous and had a reputation for carrying weapons. He was faced

with the unexpected attack from an associate of Randy Wanek. It would be unusual for a person to attack a police officer, who had his gun drawn and at the ready unless. the attacker was also armed in some manner. Corporal Magark had only a fraction of a section to determine whether he should wait and determine whether his assailant in fact had a weapon or whether it was necessary to fire his pistol for the purpose of preserving himself from death or grievous bodily harm. He did not have time to reflect on the scenario presented to him and to consider other alternative courses of action that would involve the use of less force. He did have many alternatives. He could try to avoid the lunge of his assailant but it must be remembered that Corporal Magark was two-thirds of the way into the confined space of a toilet cubicle and he had very limited range to move to avoid his assailant. He should have grabbed his assailant with his arms and taken his assailant to the floor where Constable Marks could have come to his assistance in subduing the assailant. But it must be remembered that Corporal Magark had both hands on his pistol. To use his arms or hands to tackle his assailant with a pistol in one of his hands might have resulted in either the assailant gaining control of the pistol during the ensuing struggle or the pistol could accidentally discharge and injure either Corporal Magark or Constable Marks.

If, immediately after Corporal Magark and Constable Marks entered the men's washroom, Shayne Hawkes had identified his location to the two members, indicated that he was surrendering, and obeyed the members' instructions, he would not have been shot. Instead he chose to lunge at Corporal Magark either for the purpose of making an escape or possibly for the purpose of attempting to get possession of Corporal . . . .

Finding #7:

Bearing in mind the statement of Anderson J.A. in R. v. Bottrell (1981), 22 C.R. (3d) 371 at page 380 (B.C.C.A.) **that an officer in these circumstances "... cannot be expected to measure the force used with exactitude", the Commission is unable, for the purposes of section 25 and 27 of the Criminal Code to find that Corporal Magark used more force than was necessary.**

Finding #8:

Taking into account all of the circumstances surrounding the search of the Sutherland Bible Chapel, the unexpected discovery of Shayne Hawkes in the toilet cubicle of the men's washroom, the action of Shayne Hawkes in lunging at Corporal Magark, and Corporal Magark's fear of serious bodily harm to himself or Constable Marks at the hands of Shayne Hawkes, the Commission does not find that Corporal Magark used excessive force by discharging his firearm at Shayne Hawkes as alleged in the first complaint.

6.2 RCMP Policies Relating to the Drawing and Use of Firearms

6.2.1 Types of Policies

The Force has several types of policies that relate to the drawing and use of firearms. Inspector William C. Harrower, who was the Assistant Contract Policing Officer for "E" Division from 1990 until December, 1992, gave testimony with respect to the policies that were in effect at the time when the subject matter of these complaints occurred, current policies, the development of RCMP policies and the effect of RCMP policies. There are four levels of policy, namely, National or Headquarters policy, Divisional policy, Subdivisional policy and Detachment or unit policy. National or Headquarters policies take precedence over other policies.

6.2.2 Policies in Effect at the Time of the Subject Matter of These Complaints

(a) Policies re: Drawing and Pointing of Firearms

Divisional Bulletin OM-239, entitled "Draw And/Or Point Firearm", which had been issued by the Contract Policing Branch of "E" Division (British Columbia) on October 22, 1991, was in effect in British Columbia at the time the subject matter of these complaints arose. A copy of this Bulletin was admitted into evidence and marked as Exhibit "F". Paragraph 2.a and b of the Bulletin provide:

> "a. The Criminal Code has provisions for the pointing of a firearm in cases where a "lawful excuse" exists. While it is impossible to designate specific situations where this lawful excuse may exist, the following questions should be asked of yourself prior to the drawing and/or pointing of a firearm. Am I:
>
> 1. protecting myself or others from death or grievous bodily harm;
>
> 2. preventing the escape of a person who is being arrested for a serious criminal offence; or
>
> 3. preventing the commission of a serious criminal offence.
>
> b. Use common sense and good judgement at all times when deciding if and when to draw and/or point your weapon."

When Corporal Magark withdrew his firearm from its holster and held it "at the ready" as he conducted the search of the Chapel, he was protecting himself and the officers who accompanied him from death or grievous bodily harm that could potentially be caused by a suspect in the Chapel who, based on the reputation of one of the persons arrested outside the Chapel, could be armed and dangerous. Paragraph a.1 was therefore satisfied.

In the circumstances that existed, the common sense requirement of paragraph a.2 was also satisfied.

(b) Policies re: Discharge of Firearms

The Headquarters Policy with respect to the discharge of a firearm that was in effect at the time of the subject matter of these complaints was found in Chapter 3 of the RCMP Administration Manual dealing with "Duties and Responsibilities". Paragraph E.9.2 under the heading "Discharge of Firearms" provided:

> "2. If at any time you discharge a firearm of any kind and endanger or cause injury or death to a person, inform your CO immediately through channels."

A copy of the policy, dated September 20, 1984, was admitted as Exhibit "R". The policy was directed toward the administrative action that a member, who had discharged a firearm, and that member's commanding officers should take action after the member had discharged her/his firearm in a manner that had endangered or caused injury or death to a person. No evidence was presented that would suggest that Corporal Magark failed to comply with this policy.

This policy has been revised since the date of the subject matter of these complaints.

6.2.3 Current Policy re: Discharge of Firearms

The current policy with respect to the discharge of firearms is located in the RCMP Operational Manual, Chapter 1.2 entitled "Firearms". Paragraph 2.C. provides:

> "C. POLICY
>
> C. 1. A member shall not discharge a firearm at a person except to protect life or prevent grievous bodily harm."

Paragraph G.2 provides:

> "G. 2. MEMBER
>
> G. 2. a. Do not discharge a firearm at a person except to:
>
> 1. protect life or prevent grievous bodily harm; or
>
> 2. prevent the escape of a person you are arresting/have arrested for a serious criminal offence, and you have reasonable grounds to believe, if allowed to escape, death or serious harm is likely to occur.

G. 2. b. Before you discharge a firearm as outlined in G.2.a 2., all of the following conditions must be met:

1. You must take reasonable steps to identify yourself as a peace officer.

2. You must order the person to stop.

3. Other reasonable means of a less violent nature are not readily available, e.g. immediate police backup, civilian assistance.

4. You determine there is no reasonable likelihood of injury or death to any other person."

Where human death or injury or property damage is caused by the discharge of a firearm, the current policy requires a member who discharges a firearm to report the circumstances to his or her commander. Obligations are placed on the commander to notify the officer in charge of the subdivision who in turn has specified obligations including the obligation to appoint a senior independent member to investigate the matter. The policy also contains other provisions that are not relevant to this inquiry.

6.2.4 Is the Current Policy Satisfactory?

The Criminal Code sets the legal limits with respect to the lawful use of force by a police officer including the discharge of a firearm. Policies on this subject must be carefully drafted to ensure that they do not conflict with the Criminal Code. Nevertheless, in an inquiry of this nature, it is appropriate to examine, from the perspective of the public interest, the policies of the RCMP in relation to the drawing and discharge of firearms. The current policy just came into effect about four months ago. I did not hear any evidence that would suggest and no submissions were made that there are any deficiencies in the current policy with respect to the discharge of firearms. The current policy provides guidance to members with respect to the circumstances where it may be appropriate to discharge a firearm but lays down a series of questions that the member should address before discharging a firearm.

With the new policy in place, the greatest need is to provide members with more training and retraining with respect to the application of the policy and the exercise of good judgment in relation to when it is appropriate to draw and use a firearm.

6.2.5 Training and Retraining Members in the Use of Firearms

The firearm training facility located in Depot Division in Regina is equipped with an interactive Firearms Training System. One of the features of this system is the use of

variable interactive video scenarios that place members in simulated positions where the member must exercise judgment with respect to the drawing and use of a firearm. The system enables members to develop their skills of judgment under the constructive analysis and criticism of an instructor. The Commission heard evidence that a similar facility is planned for the training centre located in Coquitlam, British Columbia. The use of the Firearms Training System should improve the exercise of members' judgment in relation to when it is appropriate to draw and use a firearm.

7. COMPLAINT WITH RESPECT TO THE USE OF SEMI-AUTOMATIC PISTOL

7.1 Use of Semi-Automatic Pistol by Corporal Magark

When Corporal Magark entered the Sutherland Bible Chapel on January 17, 1992, to search for suspects he drew his handgun. The handgun that he drew was the 9mm Sig-Sauer semi-automatic firearm that had been issued to him for use while carrying out his assignments as a member of the Emergency Response Team (sometimes referred to as "ERT"). He was not engaged in any Emergency Response Team assignments on the night of January 16-17, 1992.

7.2 RCMP Policy at the Time of the Subject Matter of the Complaints re: Use of Semi-Automatic Pistols

At the time when the subject matter of these complaints arose on January 16-17, 1992, RCMP policy with respect to the use of the 9mm semi-automatic weapon was set forth in that portion of the RCMP Operational Manual dealing with "Tactical Operation" under the heading of "Emergency Response Teams". Paragraph I.l.a provided:

> "a. Firearms issued to ERTs shall be carried or used ONLY during ERT or Expert Marksman related operations, activities, practices or training."

A copy of this policy was admitted into evidence as Exhibit "C". The effect of this policy was that the 9mm semi-automatic weapon issued to Emergency Response Team members was not to be used when the member was engaged in general duties.

Evidence that the senior management of the RCMP treated adherence to this policy as a serious matter is reflected in a memorandum issued by Chief Superintendent J. Sebastian, A.OIC Criminal Operations, "E" Division, on July 15, 1991, with reference to "Use of 9mm Semi-Automatic Pistols by ERT and PSD Members". A copy of this memorandum was entered as Exhibit "D". The memorandum began with the following statement:

> "It has become evident that ERT members and/or PSD members attached to ERT teams, are carrying their ERT weapons when not directly engaged in ERT duties."

After quoting the above quoted paragraph from the RCMP Operational Manual, he concluded the memorandum with the following statement:

> "I would expect this policy to be strictly adhered to."

This memorandum was apparently sent to officers who were responsible for commanding Emergency Response Teams. There was no evidence that a copy of this memorandum had been sent to Corporal Magark or that he had seen this memorandum.

7.3 Corporal Magark's Awareness of the Policy

The fact that Corporal Magark was aware of the RCMP policy with respect to the limited use of ERT weapons was established by an admission of fact that was tendered by counsel for Corporal Magark and admitted as Exhibit "A". It read:

> "In September of 1990, Cpl. Magark received advice from senior officers that there was a policy of the R.C.M.P. to the effect that ERT weapons should only be used in ERT and related duties. Later, Cpl. Magark confirmed he was aware of the policy and acknowledged that awareness by endorsing a copy of the policy attached at Tab 'C'."

The reference to "Tab 'C'" referred to Tab C of a book of documents that were admitted into evidence as exhibits by the agreement of counsel. Tab "C" contained a copy of the policy quoted above and a cover page on which each member of the Emergency Response Team for the North Vancouver detachment, including Corporal Magark, had placed his or her initials signifying that he/she had read the policy.

> **Finding #9**:
>
> **The Commission finds that Corporal Magark was carrying his Emergency Response Team weapon on the night of January 16-17, 1992, while engaged in general duties in contravention of RCMP policy, as alleged in the second complaint, as amended.**

7.4 Corporal Magark' s Justification for Carrying a Semi-Automatic Pistol

By carrying and using the 9mm semi-automatic Sig-Sauer firearm on January 16-17, 1992, Corporal Magark was acting contrary to the above mentioned policy. Corporal Magark tendered several justifications for not complying with the policy. First, he believed that he was much better trained in use the 9mm semi-automatic than the standard issue .38 calibre Smith & Wesson revolver. In his capacities as a member of the Emergency Response Team, a trainer of other officers, in practice, and to satisfy the monthly requalification requirement for using the semi-automatic, he estimated that he annually fired between 7,000 and 10,000 rounds with the semi-automatic pistol compared

to approximately 1,000 rounds with the .38 calibre Smith & Wesson revolver. Secondly, he believed that because of his high level of training, experience and skill in the use of the 9mm semi-automatic pistol, he could use it more safely than the .38 calibre Smith & Wesson revolver particularly in a stressful situation. Thirdly, from the perspectives of his own safety and the protection of the others, he believes that the semi-automatic pistol is a much better weapon than the Smith & Wesson revolver. Among the reasons for this belief is the fact that the semi-automatic pistol carries more ammunition, it is much easier to reload and there is less danger of accidentally firing the semi-automatic pistol.

Corporal Magark interpreted the policy as a guideline that could be ignored if he had reasonable and good reasons. He regarded the above mentioned justifications as reasonable and good reasons for ignoring the policy.

7.5 Review of the Policy by the Force

Inspector Harrower testified that Emergency Response Teams members were equipped and trained in the use of 9mm semi-automatic Sig-Sauer pistol in 1985. Inspector Harrower testified that almost from the inception of the use of the 9mm semi-automatic pistol by ERT members and members of other specialized units, requests were received by the management of the Force that these members be permitted to carry and use the weapon when they were engaged in general duties. In September, 1990, Deputy Commissioner Wilson (now retired) directed that a review of the policy be conducted. Inspector Harrower testified (at page 369 of the transcript) that the review was precipitated in part by:

> ". . . written submissions that came forward as a result of the incident involving Corporal Magark in North Vancouver, in Glover -- Mr. Glover."

On March 23, 1992, the policy was revised in a manner that permits members of Emergency Response Teams to carry the 9mm semi-automatic pistol in the course of their general duties. The current policy is quoted later in this report.

Inspector Harrower testified that among the reasons for revising the policy was the fact that ERT members were better trained and had more experience in the use of the semi-automatic pistol than the standard issue .38 calibre Smith & Wesson revolver. The higher level of training and experience could be expected to provide a higher level of safety in the use of a member's handgun.

The review that led to the revision of this policy has apparently developed into an examination of the broader issue of whether or not the standard issue firearm of the RCMP, namely, the .38 calibre Smith & Wesson. Model 10, five inch barrel was an adequate weapon for general duty purposes.

7.6 Consequences of the Contravention of Policy by Corporal Magark

Corporal Magark's use of the 9mm semi-automatic pistol on the night of January 16-17, 1992, while he was engaged in general duties, was contrary to the RCMP policy referred to above that provides:

> "Firearms issued to ERTs shall be carried or used ONLY during ERT or Expert Marksman related operations, activities, practices or training."

The fact that Corporal Magark was carrying a semi-automatic pistol on the night of January 16-17, 1992, was immaterial in relation to whether or not Shayne Hawkes would have been shot. If Corporal Magark had been carrying a standard issue .38 calibre Smith & Wesson revolver, the events would have occurred in the same manner.

Did Corporal Magark's contravention of the RCMP policy with respect to the use of semi-automatic pistols constitute a breach of the RCMP Code of Conduct? Ms. Frost provided the Commission with a copy of a decision of an Adjudication Board established pursuant to Part IV of the Royal Canadian Mounted Police Act dated March 30, 1992. The name of the member who was the subject of the decision of the Adjudication Board had been deleted in conformity with the Privacy Act, R.S.C. 1985, c. P-21. In that case, it was alleged that the member had committed a breach of the RCMP Code of Conduct because he apparently released some information about a traffic accident to insurance adjusters or others in contravention of a Force policy. The Adjudication Board held that a contravention of RCMP policy is not a breach of the RCMP Code of Conduct that can be the subject of a discipline proceeding against the member. The Board referred to the covering page of the RCMP Operational Manual, dated June 1, 1988 where the Commissioner stated that each member "... is expected to interpret them reasonably and intelligently, in the best interests of the RCMP." The Board then held:

> "As the Commissioner has stated, policies are to be reasonably and intelligently interpreted by each member. This demonstrates they are to be seen as a guideline. The failure of a member to comply with the policy in a reasonable and intelligent way may well suggest a defect in performance and the need for guidance, assistance and supervision of that member. It does not, however, fall within the Code of Conduct, unless there is a failure to comply with a specific, clear and mandatory order."

Therefore, the Board dismissed the alleged contraventions of the Code of Conduct that had been made against the member. Ms. Frost, Mr. Ball and Commission counsel all agreed a contravention of Force policy did not constitute a breach of the RCMP Code of Conduct.

I asked Ms. Frost, in her capacity as counsel for the appropriate officer, whether the Commissioner could have issued a standing order prohibiting the use of the semi-automatic pistols by ERT officers while they were engaged in general duties. She

responded that the Commissioner had the power to issue a Commissioner's Standing Order but she advised that the Commissioner had not done so.

If the Commissioner had issued a Commissioner's Standing Order prohibiting the use of semi-automatic pistols by ERT officers while they were engaged in general duties, different considerations might apply on a review of Corporal Magark's use of a semi-automatic pistol on January 16-17, 1992. Similarly, if a superior officer had given a specific order to Corporal Magark directing him not to use a semi-automatic pistol while engaged in general duties, different considerations might apply on a review of Corporal Magark's conduct. But neither of these events occurred. Merely drawing a breach of a policy to the attention of a member and counselling the member to abide by the policy does not constitute a "direct order" whose breach constitutes a discipline offence.

Finding #10:

The Commission finds that Corporal Magark's contravention of RCMP policy by carrying a semi- automatic pistol while engaged in general duties on the night of January 16-17, 1992, was not conduct in the performance of a duty or function under the Royal Canadian Mounted Police Act that warrants any recommendations by the RCMP Public Complaints Commission. This finding is made without prejudice to any performance review or remedial action that may have been taken by the Force in relation to Corporal Magark's contravention of Force policy.

7.7 Current Force Policy

The current RCMP policy is found in the RCMP Administration Manual in Chapter 1.3 of "Duties and Responsibilities" under the heading "Use of 9MM Firearms by E.R.T. Members". It provides:

"a. General

1. Effective 92.04.01 Emergency Response Team Members (ERT) only will be given permission to carry the 9MM pistol during the course of their regular duties.

2. Police Service Dog Masters assigned specifically to ERT duties will also be given permission to carry the 9MM pistol.

Note: The use of 9MM by all Dog Masters is being addressed separately in the 9MM study.

3. All members removed from or leaving ERT will be retrained on the use of the .38 Special S&W and shall turn in their 9MM pistols."

A copy of the policy was admitted as Exhibit "T".

7.8 The Public Interest in the Use of Semi-Automatic Pistols by Members on General Duty

The hearing into these complaints was called in the public interest. One aspect of the public interest which was identified is whether there were any reasons to limit the use of semi-automatic weapons by members of the RCMP engaged in general police duties.

It is not the purpose of this report to make any recommendations from a law enforcement officer's perspective or a police management perspective with respect to the most suitable type of handgun for use by general duty members. There are many criteria that the management of the Force must consider when making any decision with respect to the type of handgun that will be issued to general duty members. Nevertheless, when a police force is considering the introduction of a new type of weapon for use by members engaged in general duties, there is often a concern among members of the public about whether the safety of the public generally may be jeopardized by the introduction of a new type of weapon. This report will only attempt to identify whether there are any factors, from a public interest perspective, that should be regarded as limiting factors in any decision making process with respect to whether members of the RCMP engaged in general duties should be equipped with semi-automatic pistols.

Two recent reports were admitted into evidence that compared the features of the .38 calibre Smith and Wesson revolver with semi-automatic pistols. One report, entitled Firearms and Ammunition, dated September 1992, was prepared by the Vancouver Police Department Committee for Firearms and Ammunition. The report consisted of 52 pages and appendices. The other documentation consisted of a 1993 report and certain orders made pursuant to the Ontario Occupational Health and Safety Act by the Occupational Health and Safety Branch of the Ontario Ministry of Labour with respect to the weapons used by the Ontario Provincial Police. The Commission considered these reports strictly from the perspective of whether they revealed any public interest that should be identified and taken into account in any decision to equip members engaged in general duties with semi-automatic pistols.

Testimony was also received from Inspector Harrower with respect to the reasons why Emergency Response Team members have been equipped with 9mm semi-automatic pistols. He testified that the overall reason was that members of the Emergency Response Team required a weapon that was technically superior to the .38 calibre Smith & Wesson, to deal with the dangerous circumstances that members of these teams may encounter. These dangerous circumstances included the necessity of dealing with criminals who have more sophisticated weapons than the .38 calibre Smith & Wesson revolver. The

9mm semi-automatic is regarded as a superior weapon for several reasons including its larger ammunition capacity that enables a member to fire a greater number of rounds without reloading. Reloading can be accomplished more quickly without the necessity of the member taking her/his eyes off a target and with one hand, if necessary.

Nothing was discovered in the above mentioned reports or the testimony of Inspector Harrower that would suggest that a semi-automatic pistol is more dangerous to the public than the standard issue .38 calibre Smith and Wesson revolver that is currently used by RCMP members engaged in general duties. On the contrary, these reports suggest that the semi-automatic pistol may be a safer weapon from the perspective of the general public because there is less likelihood that the semi-automatic pistol will be accidentally discharged. The reports refer to instances where a .38 Smith and Wesson revolver has been accidentally cocked by catching the hammer on clothing or other apparatus. When a revolver is cocked, it can be discharged with much less pressure, even accidental pressure, on the trigger.

The fact that Corporal Magark was carrying a semi-automatic pistol on the night of January 16-17, 1992, when Shayne Hawkes was shot is immaterial in relation to the question of whether there are any limiting factors that should be considered from a public interest perspective in determining whether to equip RCMP members engaged in general duties with semi-automatic pistols. Shayne Hawkes would have been shot regardless of whether Corporal Magark was carrying a semi-automatic pistol or he was carrying a .38 calibre Smith & Wesson revolver.

Finding #11:

On the evidence tendered before the Commission and the submissions of Counsel, the Commission has not identified any factors that, from a public interest perspective, should be regarded as limiting factors in any decision making process with respect to whether members of the RGMP engaged in general duties should be equipped with semi-automatic pistols.

8. COMMENDATIONS

Previous reports of the Public Complaints Commission have made recommendations with respect to policies and programs of the Force. When the Commission identifies changes in policies or programs that have responded to previous recommendations of the Commission, it is appropriate to acknowledge the responses and commend the Force for making the changes. By acknowledging these improvements, both complainants and the public at large will be assured that the RCMP has been responsive to the recommendations made by the Commission. Two such improvements came to my attention during the course of this hearing. One relates to in-service training with respect to the use of force. The other relates to the preservation of radio transmissions relating to the subject matter of a complaint.

8.1 In-service Training and Requalification on the Use of Certain Types of Force

One of the recommendations, which was made by the Public Complaints Commission in its report with respect to the complaints of Michael and Stephen Cooper, was a recommendation that the Force consider the development and provision of in-service training programs with respect to the various techniques relating to the use of force.

In his testimony before this hearing Inspector Harrower referred to a new program which will commence in "E" Division in 1994 that will require requalification of members with respect to the use of certain types of force. The details of this program are apparently still being finalized but I was provided with copies of the proposal put forward by Inspector Harrower, dated June 14, 1993, and a memorandum from Assistant Commissioner F. G. Palmer, dated November 1, 1993, wherein he requested the Administration and Personnel Branch of "E" Division to give expeditious consideration to Inspector Harrower's proposals with a view to adopting "a coordinated annual use of force requalification process for 1994." Inspector Harrower's proposal provides, in part:

> "I believe that the use of force in-service training should be incorporated into our annual firearms requalification process. A member attending for annual firearms qualification would:
>
> a) Receive a brief refresher lecture (video or handout) on legal authorities and policy aspects relating to the use of force;
>
> b) View a brief video (10 minutes) on the use of the carotid control technique;
>
> c) View a brief video or receive instruction on the use of a baton;
>
> d) View a brief video or receive instruction on the use of pepper spray;
>
> e) Requalify with his firearm and the shotgun."

In his testimony and in his proposal, Inspector Harrower also referred to the acquisition of the Firearms Training System for installation at the RCMP training centre in Coquitlam.

The Force is commended for developing these facilities and adopting these programs.

8.2 Preservation of Record of Radio Communications

One of the recommendations, which was made by the Public Complaints Commission in its report with respect to the complaint of Caroline Halliday was that when a complaint

has been filed, the Force should preserve a record of radio communications by members who were involved in the subject matter of the complaint and that the record be made available to the Commission as evidence. The transcripts of the radio transmissions that pertained to the subject matter of the complaint in this case were an invaluable source of evidence. The Force is commended for preserving a record of these radio communications.

9. SUMMARY OF FINDINGS AND RECOMMENDATIONS

Finding #l

The Commission finds that Corporal Magark did not know nor should he have known that a police service dog was on duty in the North Vancouver detachment and available at the time when the search of the Sutherland Bible Chapel was commenced. Corporal Magark's conclusion that no police service dog was on duty in North Vancouver was a reasonable inference to be drawn from the lack of any response by radio to his inquiry about whether a police service dog was on duty.

Finding #2

The Commission finds that the decision of Corporal Magark to conduct a search of the Sutherland Bible Chapel on the night of January 17, 1992, without waiting for the assistance of a police service dog was not an unreasonable decision based on the circumstances known to Corporal Magark at the time when the search was commenced.

Finding #3

The Commission finds that no clear conclusion can be drawn that, if a police service dog had been used to conduct the search of the Chapel, the shooting of Shayne Hawkes would necessarily have been avoided.

Finding #4

Taking into account the information possessed by Corporal Magark and the other members prior to commencing the search of the Sutherland Bible Chapel, the Commission finds that the drawing of a handgun from its holster and having it at the ready while conducting a search of the Chapel was not an excessive use of force by Corporal Magark or any of the other members who participated in the search.

Finding #5

The Commission finds that Corporal Magark discharged his pistol when he observed Shayne Hawkes lunging at him.

Finding #6

The Commission finds that Corporal Magark believed on reasonable grounds that it was necessary to discharge his pistol for the purpose of preserving himself from death or grievous bodily harm.

Finding #7

Bearing in mind the statement of Anderson J.A. in R. v. Bottrell (1981), 22 C.R. (3d) 371 at page 380 (B.C.C.A.) that an officer in these circumstances ". . . cannot be expected to measure the force used with exactitude", the Commission is unable, for the purposes of section 25 and 27 of the Criminal Code to find that Corporal Magark used more force than was necessary.

Finding #8

Taking into account all of the circumstances surrounding the search of the Sutherland Bible Chapel, the unexpected discovery of Shayne Hawkes in the toilet cubicle of the men's washroom, the action of Shayne Hawkes in lunging at Corporal Magark, and Corporal Magark's fear of serious bodily harm to himself or Constable Marks at the hands of Shayne Hawkes, the Commission does not find that Corporal Magark used excessive force by discharging his firearm at Shayne Hawkes as alleged in the first complaint.

Finding #9

The Commission finds that Corporal Magark was carrying his Emergency Response Team weapon on the night of January 16-17, 1992, while engaged in general duties in contravention of RCMP policy, as alleged in the second complaint, as amended.

Finding #10

The Commission finds that Corporal Magark's contravention of RCMP policy by carrying a semi-automatic pistol while engaged in general duties on the night of January 16-17, 1992, was not conduct in the performance of a duty or function under the Royal Canadian Mounted Police Act that warrants any recommendations by the RCMP Public Complaints Commission. This finding is made without prejudice to any performance review or remedial action that may have been taken by the Force in relation to Corporal Magark's contravention of Force policy.

Finding #11

On the evidence tendered before the Commission and the submissions of Counsel, the Commission has not identified any factors that, from a public interest perspective, should be regarded as limiting factors in any decision making process with respect to whether members of the RCMP engaged in general duties should be equipped with semi-automatic pistols.

APPENDIX 2

Royal Canadian Mounted Police · Gendarmerie royale du Canada

N.D. Inkster
Commissioner Le Commissaire

March 16, 1994

Jean-Pierre Beaulne, Q.C.
Chairman
RCMP Public Complaints Commission
P.O. Box 3423
Station "D"
Ottawa, Ontario
K1P 6L4

Dear Mr. Beaulne:

I acknowledge receipt of the interim report of February 7, 1994, file references 2000-PCC-92235, 92G-4769, and materials relevant to the complaints of Mr. Cameron Ward.

The conclusions have been examined and the following notice is provided pursuant to the Royal Canadian Mounted Police Act.

I concur with your findings. I would like to take the opportunity to thank Mr. Lyman R. Robinson, Q.C., the member you appointed to conduct the hearing, for his thorough and complete review of the complaints.

Thank you for your advice. I look forward to receiving your final report.

Sincerely,

N.D. Inkster

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